

1 UNITED STATES DISTRICT COURT  
 2 EASTERN DISTRICT OF VIRGINIA  
 3 Richmond Division

4 BARBARA H. LEE, et al. }

5 v. }

Civil Action No.  
 3:15 CV 357

6 VIRGINIA STATE BOARD OF ELECTIONS, }  
 et al. }

7 February 25, 2016

8 **COMPLETE TRANSCRIPT OF BENCH TRIAL**  
 9 **BEFORE THE HONORABLE HENRY E. HUDSON**  
**UNITED STATES DISTRICT COURT JUDGE**

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REDIRECT-EXAMINATION OF DR. MINNITE

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1 (The proceeding commenced at 8:51 a.m.)

2 (Krista Harding is now the court reporter.)

3 THE COURT: Good morning.

4 MR. SPIVA: Good morning.

5 MR. HEARNE: Good morning.

6 THE COURT: We resume this morning with the redirect  
7 examination of Dr. Minnite. Doctor, if you'd resume the  
8 seat on the witness stand, ma'am.

9 One other bit of housekeeping. I'm going to begin  
10 tomorrow morning at 9:30 and recess at 4:00. Over the  
11 course of the week, a lot of things have been accumulating  
12 in my in-box I've got to address before the end of the  
13 week. So I hope that doesn't inconvenience you-all too  
14 much.

15 MR. KAUL: We will appreciate the extra half hour of  
16 sleep, Your Honor.

17 THE COURT: I didn't think you-all would mind when I  
18 thought of that.

19 MR. KAUL: I think I speak for everybody on both  
20 teams.

21 THE COURT: Go right ahead with your examination of  
22 the Doctor.

23 MR. KAUL: Thank you, Your Honor.

24 **REDIRECT EXAMINATION**

25 BY MR. KAUL:

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1 Q Dr. Minnite, I just want to briefly touch on two of  
2 the topics that you and Mr. Hearne discussed a moment ago  
3 -- a day ago. Let me start with this one.

4 You were asked some questions about the form of ID  
5 required for HAVA. Do you recall that?

6 A Yes.

7 Q And I believe you were asked about whether if HAVA  
8 were not in place, a person could go to the polls and  
9 register without ever showing identification and vote  
10 without showing identification. Do you recall that  
11 hypothetical?

12 A Yes.

13 Q Now, HAVA was in place prior to either of the voter  
14 identification requirements being passed in Virginia, is  
15 that right?

16 A Yes.

17 Q Okay. So when HAVA was in place, was there a system  
18 for identifying a registrant? And this is before the  
19 voter ID laws, I'm talking now. Was there a system in  
20 place for confirming the identity of a registrant, even if  
21 the registrant didn't register in person?

22 THE COURT: Are you talking about in Virginia or  
23 nationwide?

24 MR. KAUL: Virginia.

25 THE COURT: Okay.

1 A Yes.

2 Q And can you just explain how that works?

3 A Well, Virginia had an identification requirement --  
4 are you talking about after they've registered or before  
5 they've registered?

6 Q I'm talking about sort of how it worked for HAVA  
7 registrants before the voter ID laws were in place.

8 A Okay.

9 Q Let me back up a step. My question wasn't clear.

10 A No.

11 Q So when people would register prior to the voter ID  
12 law, they were either subject to the HAVA identification  
13 requirements or not, right?

14 A Right. I mean, HAVA was passed in 2002.

15 Q Yes.

16 A And Virginia already had an identification law. I  
17 believe it was passed in 1996.

18 Q Okay.

19 A That was in place until 2012. So, are you talking  
20 about the period between 2002 and 2012?

21 Q Yes. I'm sorry. That is what I was aiming for.

22 A Okay. So a person who registered to vote in Virginia  
23 between 2002 and 2012 would supply their social security  
24 number on the registration application. And then going --  
25 they would go to the polls, and they would be subjected to

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1 the existing law that was in place from 1996, which  
2 allowed them to show a voter registration card, a social  
3 security card, a driver's license, a government-issued  
4 identification, or they could, if they didn't have that,  
5 they could attest to their identity.

6 Q And what if a voter who registered did not provide  
7 their social security number?

8 A I'm not sure what -- I don't know that I remember  
9 what the rules were for that.

10 Q Were there certain voters who had to provide a form  
11 of identification at the polls under HAVA?

12 A Yes.

13 Q And who were those voters?

14 A Well, they would be the ones who were registering in  
15 a jurisdiction and voting for the first time in that  
16 jurisdiction if they had registered by mail.

17 Q So anybody who was showing up at the polls who had  
18 already registered by either providing their social  
19 security number or providing an identity at the polls, or  
20 having previously registered in Virginia?

21 A Yes.

22 Q And you were asked about some statements that Senator  
23 Bond made regarding HAVA. And you mentioned that you had  
24 done a case study of that in your book?

25 A Yes.

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1 Q What did you find in your in-depth study of that  
2 situation that you were referring to yesterday?

3 A Well, I guess, as I described yesterday, the passage  
4 of the bill took a while. And it had to go through the  
5 House, had to go through the Senate. There were hearings,  
6 and so forth. And it was when the conference committee  
7 was put together, and Senator Bond was in that, was part  
8 of that, that the identification requirement got put back  
9 in.

10 So, in other words, once the conference version of  
11 the bill came out, both the House and the Senate then have  
12 to repass that bill, and it had the section -- again, I  
13 think it was 301(b) in it, which is this HAVA requirement  
14 that we've been discussing.

15 That wasn't in the bill when it went into conference.  
16 When it came out of conference it was there. And Senator  
17 Bond was on the conference committee, and it was his  
18 strong belief that it should be there.

19 Q Okay. So that wasn't something that was passed by an  
20 amendment in either of the Houses? It came out of  
21 conference?

22 A That's right.

23 Q And then the full bill was passed?

24 A Right.

25 Q You were asked about some newspaper articles

1 yesterday. Do you recall that?

2 A Yes.

3 Q And some of them relate to St. Louis. Do you recall  
4 that?

5 A Yes.

6 Q Is that a topic that you, in the course of your  
7 research, have studied in-depth?

8 A Yes.

9 Q And so the article that you were shown, at what stage  
10 in the sort of process of those allegations did that  
11 article come out, if you know?

12 A It came out at the -- in a sense, at the beginning,  
13 were there had been this incident of voter registration  
14 applications that were collected by a voter registration  
15 drive being kind of, you know, given to the Board of  
16 Elections on the last day. And I think there were  
17 something like 1,200 or 1,500 of them that were submitted  
18 by the group. It was called Operation Big Vote. It was  
19 submitted by them on the last day.

20 And there was some flagrant fake registration cards  
21 in there. My recollection is that someone on the -- one  
22 of the workers at the Board of Elections recognized, you  
23 know, her dead mother. And then there was the famous case  
24 of the very well known alderman in St. Louis who had been  
25 dead since 1990. His name was on one of the applications.

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1 So it was immediately recognized as problematic. And  
2 there was an investigation.

3 And I believe that article, I don't recall exactly  
4 the date of the article, but it was talking about this  
5 problem that had happened where there were these fake  
6 cards that were submitted.

7 Q So you said there was an investigation conducted?

8 A This was a grand jury investigation into it. The  
9 woman who was the supervisor of the organization that  
10 collected these registration applications actually was --  
11 ended up being convicted of perjury to the grand jury  
12 because she told the grand jury she didn't have any way of  
13 keeping control of the people who were working for her, or  
14 tracking the cards. And she was bound to turn them in.

15 And I think there was testimony by somebody else who  
16 contradicted that and said, no, there was a meeting. They  
17 had copies of the cards. She could have figured it out.  
18 She wasn't convicted of fraud. She was convicted of  
19 perjury. And she had a suspended sentence for it.

20 I think there were five or six of the workers who  
21 collected the cards who admitted that they put fake names  
22 on them who were convicted as well.

23 Q Okay. So this is the case where there clearly was  
24 prosecutorial interest in bringing charges, right?

25 A Oh, yes.

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1 Q Was there any voter impersonation found in that  
2 investigation?

3 A Not to my recollection. I mean, those people didn't  
4 get registered. I think they flagged, you know, like a  
5 third of all the cards that had been turned in as just  
6 flagrant -- you know, going through a phone book, and the  
7 handwriting is all the same, and so forth. So it was easy  
8 to catch by the election workers.

9 Q So this is something that election workers caught in  
10 the ordinary course?

11 A Yes.

12 Q Was the -- well, what was the motive for the people  
13 who filled out the false registration?

14 THE COURT: How would she know what someone else is  
15 thinking about?

16 BY MR. KAUL:

17 Q Were there statements made about why the people who  
18 filled out the registrations?

19 A No. I mean, what was reported was that this  
20 organization wasn't affiliated with any candidate. But  
21 there was a sort of tense competition. It was a  
22 Democratic primary. There was a competition between two  
23 candidates, and I think somebody was trying to come back  
24 into office and to challenge.

25 Even though that was going on, this wasn't an

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1 operation related to those candidates, and therefore there  
2 was even less of an incentive to make sure that what they  
3 were doing was correct. It was just one of the women who  
4 was convicted of the fake cards was also convicted of  
5 possession of crack cocaine. So there were problems with  
6 the people who were collecting the cards, and no showing  
7 of like a conspiracy on the part of one of the candidates  
8 to commit the fraud.

9 Q Was there any indication that these were being filled  
10 out so that individuals could go and vote in the names of  
11 those registrations?

12 A No.

13 Q And is this something that you recall -- recount  
14 in-depth in your book?

15 A I don't actually talk about that story, but I was  
16 tracking it. You know, all my files on the case, I was  
17 tracking that story because the conviction came a little  
18 bit later. This actually was -- that was the 2001 mayoral  
19 primary that happens in the spring, and my case was on the  
20 2000 presidential election in the previous November. But  
21 I was very aware of it. I didn't quite remember it when  
22 the article came on on my screen here.

23 Q So is this something that was accounted for in your  
24 overall findings and conclusions in the work you've done?

25 A Yes.

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1 Q Going back to the false voter registration issue. In  
2 your, I guess, 15 years or so of study of this issue, are  
3 you aware of any case ever in which a registration was  
4 submitted in a fake name, and a voter then used that  
5 registration and cast a ballot?

6 A No.

7 THE COURT: I assume you're talking about whether or  
8 not that resulted in a charge or conviction?

9 MR. KAUL: I'm asking if she has any knowledge of any  
10 context.

11 THE COURT: All right. That's fine.

12 A No.

13 Q You were asked about a news article from Milwaukee.  
14 Do you recall that?

15 A Vaguely.

16 Q Let me just ask you briefly about Milwaukee. Is that  
17 another issue that you studied in-depth?

18 A Yes.

19 Q And I think you said on cross-examination that you  
20 actually talked to the U.S. Attorney?

21 A Yes. I interviewed the U.S. Attorney.

22 Q And this was during the Bush Administration when  
23 there was an emphasis on prosecuting fraud cases?

24 A That's correct.

25 Q Did -- and can you explain sort of what was going on

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1 with that, the investigation in Milwaukee, at that time?

2 A Well, as I was talking about yesterday, the Milwaukee  
3 Journal Sentinel really focused like a laser on the  
4 problems in Milwaukee. There were problems both in 2000,  
5 and then in 2004. And the county DA wanted to try to  
6 prevent some of the problems they had in 2000, so he  
7 approached the U.S. Attorney, the police department in  
8 Milwaukee, and they said, well, let's put a task force  
9 together to monitor, be aware of, what's going on.

10 And after the 2004 election, they followed up on a  
11 lot of the irregularities that had been uncovered and  
12 reported on by the Milwaukee Journal Sentinel. Some of  
13 them were things I've mentioned, like the newspaper got a  
14 hold of the poll log books, and they looked at the number  
15 of people who were signing in, and they looked at the  
16 number of ballots. And there were cases where they didn't  
17 match. There were same-day registration applications  
18 where the required follow-up hadn't been done. And there  
19 was a kind of, you know, massive dysfunction in the  
20 Milwaukee Board of Elections.

21 And when I interviewed the U.S. Attorney, he had  
22 brought more cases in a single place than almost anybody  
23 else as a U.S. Attorney. He focused on trying to  
24 prosecute voter fraud. And I said, well -- I think he had  
25 charged 14 people. There were 10 who were charged because

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1 they had felony convictions, and there were four who were  
2 charged as double voters. But he didn't have a very high  
3 conviction rate. I don't recall exactly, but there were,  
4 you know, maybe half of them were -- either pled guilty or  
5 were convicted.

6 I told him that I had talked to defense lawyers in  
7 Milwaukee who all said to me *"We've never seen the federal*  
8 *government do something like this before."* All of these  
9 people are indigent. All but one was African-American.  
10 They had never seen the federal government go after people  
11 for this charge. You know, bringing the full weight of  
12 the federal government against these people. What's going  
13 on?

14 So I said to him, *"This is what they say to me."*

15 *"What do you say to that?"*

16 He said, *"We didn't"* -- and he said this publically  
17 as well. *"We didn't find any conspiracy to try to*  
18 *manipulate the election. In the end, we didn't even*  
19 *finish our report, our task force report, because there*  
20 *were some problems, administrative problems. We could not*  
21 *prove that people did this deliberately. There were*  
22 *better explanations for those irregularities."*

23 So that was the outcome. And the report that a lot  
24 of people cite, which was the preliminary findings, which  
25 was actually leaked many years -- several years after the

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1 fact, that was something that the -- when it was leaked by  
2 somebody who worked on it, that was when the police chief  
3 came out and he was very unhappy that it had been leaked.

4 There was no final report. I kept following up. I  
5 had interviewed the director -- the Executive Director of  
6 the Election Board. And I kept following up with her.  
7 When are they going to come out with their final report?

8 And there was no final report because there was  
9 nothing -- they sort of abandoned it, I would say, from my  
10 point of view. They abandoned it because they just  
11 decided that the real problems were with the election  
12 administration, and not a problem with criminality and  
13 fraud.

14 Q And just to sort of summarize, this was an intensive  
15 investigation into fraud in Milwaukee?

16 A Yes.

17 Q And how many cases of voter impersonation were  
18 charged?

19 A None.

20 Q All right. Was that case study accounted for in the  
21 work that you've done over the years?

22 A Yes.

23 Q And then I want to ask you about the last point that  
24 he asked about, which is in Washington, in the State of  
25 Washington, during the year where there was a recount. Do

1 you recall that?

2 A Yes.

3 Q And just briefly, you probably learned a lot about  
4 recounts in examining this, right?

5 A Yes.

6 Q And in recounts, literally, the lawyers go ballot by  
7 ballot arguing about circumstances they can use to kick a  
8 ballot out and put a ballot in, is that right?

9 A Yes. When I interviewed lawyers who worked on that  
10 case -- I didn't actually see this. But they told me they  
11 had an entire room full of boxes of materials that had  
12 been collected as part of that litigation that involved,  
13 you know, copies of records and depositions of everybody  
14 involved, and lots of documentation.

15 And I think at that time that was considered one of  
16 the most documented elections in the history of the United  
17 States until we get to the Minnesota Senate race with Al  
18 Franken. And that was an extremely close race as well.  
19 And a recount was involved. And that one may end up being  
20 more documented than the one in Washington. But it was  
21 intensively documented for the litigation.

22 Q Having seen that documentation, was there widespread  
23 voter impersonation fraud in that case?

24 A No. What there was, if I may?

25 Q Please.

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1 A I believe that the article referred to King County.  
2 And the District Attorney in King County charged eight  
3 people with having submitted absentee ballots for other  
4 people, but seven of them were people who had spouses who  
5 died just before the election, and they were still  
6 charged. They didn't receive prison sentences. But two  
7 of them -- I recall the comments from two of them where  
8 they were elderly people. The ballot had arrived in the  
9 mail because everybody votes by mail. They didn't know  
10 what to do with the ballot. One said she just signed the  
11 name and sent it back in. That was in King County.

12 So I don't count that as voter impersonation. I  
13 counted it as fraud because you're not supposed to do  
14 that. And I think somebody should know that in that  
15 instance. They said they did. But one man apologized.  
16 He said, you know, in my grief, I didn't know what to do  
17 and I just signed it and sent it back in.

18 Q So in that case, what fraud there was was absentee  
19 voting?

20 A Yes.

21 Q And it was seven out of eight times a person whose  
22 spouse had died and they cast the ballot?

23 A Yes.

24 Q So I think Mr. Hearne asked you about news articles  
25 popping up around every election about allegations of

1 fraud. Is that consistent with the observations you've  
2 made?

3 A Yes.

4 Q Okay. And a lot of what your work has been doing  
5 over the last year is chasing those down, is that right?

6 A Absolutely. Yes.

7 Q And have you observed a pattern in doing that?

8 A Well, the pattern has been, at least over the last 10  
9 or 15 years, that the fraud arguments rise to the level  
10 of, you know, media coverage well before an election. And  
11 the allegations are thrown around, and then when you --  
12 you both have to follow what happens if there are  
13 legitimate concerns, but also, you know, they become part  
14 of the campaign, I would say.

15 Q What do you mean by that?

16 A Well, we're seeing it a little bit in the  
17 presidential primary contest right now with charges being  
18 thrown by one candidate against another about fraud on  
19 both sides. And, you know, when you -- you have to look  
20 at them. You have to try to figure out what's going on.  
21 And in most cases in terms of the pattern, they boil down  
22 to something other than fraud.

23 Q And have you made observations about claims of fraud  
24 being used as a political tactic?

25 A Yes.

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1 Q Have you observed groups that popped up, made  
2 allegations of fraud, and then disappeared?

3 A Yes.

4 Q Now, when you were cross-examined, I don't believe  
5 you were shown any scholarly articles, but you have  
6 reviewed the scholarship on voter fraud, right?

7 A Yes.

8 Q In the cases that you were describing before, defense  
9 experts have testified about their research regarding  
10 voter fraud, right?

11 A Which defense experts?

12 Q Let me ask about Dr. Hood. Do you recall him  
13 testifying about work he's done?

14 A In other cases?

15 Q Yes.

16 A Yes.

17 Q And he's testified on the opposite side of cases from  
18 you, is that right?

19 A Well, I haven't actually observed his testimony, but  
20 I've read his expert reports.

21 Q And he's done scholarly work on fraud, right?

22 A He did do one early article. Right.

23 Q What did he find?

24 A He found no fraud.

25 Q And going back to this point about fraud being a

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1 tactic. Do you recall being asked some questions about a  
2 video of James Moran?

3 A Patrick Moran?

4 Q Thank you. Do you recall being asked some questions  
5 about that?

6 A A few questions.

7 Q And was that a -- was that a -- well, that was a  
8 sting video, right?

9 A That's how I would see it.

10 Q So, it was essentially manufactured evidence of  
11 fraud?

12 A Well, yeah. Well, manufactured in trying to trap  
13 somebody into doing something stupid, which I think that  
14 fellow admitted later he did.

15 Q Briefly, you were asked about tax fraud cases before?

16 A Yes.

17 Q Was that a priority subject matter for the Bush  
18 administration prosecuting, do you know?

19 A I don't know. It didn't rise to the level of Number  
20 1 or Number 2 according to Mr. Donsanto, who was the  
21 election crimes branch director.

22 Q But election fraud was Number 2?

23 A That's what he said.

24 Q All right. I want to ask you about two documents you  
25 were questioned on. The first is DX 397, which is your

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1 article about modeling problems.

2 THE COURT: Is that the defenses' exhibit or the  
3 plaintiffs' exhibit?

4 MR. KAUL: I'm sorry. Defendants' Exhibit 397.

5 And I'm going to ask Ms. Schultz to bring it up just  
6 to refresh her memory about what the conclusion says. And  
7 I apologize, I don't have the page number, but it's the  
8 very end of the article.

9 BY MR. KAUL:

10 Q Now, you were asked -- and I'm not going to use it  
11 quite yet. But you were asked about a couple of  
12 paragraphs in this conclusion, is that right?

13 A Yes.

14 Q Now, I'm going to ask Ms. Schultz to pull up the  
15 third paragraph now. And in your article, did you, after  
16 discussing problems with statistical analysis at the time  
17 of modeling turnout, did you discuss a promising  
18 alternative to determining whether voter ID laws impose a  
19 disproportionate impact on minority voters?

20 A Yes.

21 Q And what was that?

22 A Well, we said he didn't think the science was up to  
23 the task. We didn't think that the data or the  
24 statistical methods we had for analyzing it would allow us  
25 enough precision to measure something like a 1 or a 2 or

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1 even a 3% suppressive effect on turnout. So if voter ID  
2 laws in the aggregate had only say like 1 or 2%  
3 suppressive effect, that is, you could isolate that voter  
4 ID law as the single causal effect of something like 1 or  
5 2% on turnout, we would not be able to measure it  
6 effectively - this was at the time - because we didn't  
7 think the data that has been developed and the tools give  
8 us that level of precision.

9       What I'm saying is that suppressive effect could be  
10 within the bands of kind of an error rate. And you  
11 wouldn't know are you looking at an actual causal effect,  
12 or are you seeing an effect, but it's caused by other  
13 random problems -- or random noise in the data. So we  
14 said given that, why don't you just ask how many people  
15 don't have the ID. That should help give you a sense of  
16 what the problems could be better than arguing at this  
17 point about turnout because we've only had a couple of  
18 states really put these restrictive laws in. We don't  
19 have, you know, a big enough sample in that regard. And  
20 we don't have enough time to see because turnout is such a  
21 complex phenomenon, and many things impact it. We need a  
22 longer range of time to see if we can tease out the  
23 effects of any single law.

24       It becomes very complicated because both -- because  
25 there are many factors involved in turnout. But also

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1 because, as we see now, the states, actually when they are  
2 adopting these laws, I don't know if any two states are  
3 exactly the same. You have to look at what are the  
4 exceptions, you know, what do you do if you don't have it.  
5 All these things factor into the comprehensive impact of  
6 the law on turnout, and it becomes very complicated to  
7 model it.

8 And we said it's reasonable to ask how many people  
9 actually have this ID at this point, and worry about that.  
10 It was easier to do that kind of analysis then to put a  
11 lot of weight on the statistical analysis that was getting  
12 you into the debate of is it suppressing turnout or not.

13 Q Did you review Dr. Rodden's expert report in this  
14 case?

15 A I did not.

16 Q Now, you refer to at the time of the article, has the  
17 state of the data available to analyze voter  
18 identification laws changed since this article came out in  
19 2009?

20 A Well, only to the extent that we now have, you know,  
21 five, six, seven, eight more years of experience that  
22 people have been using the data set that Professor Richman  
23 relied on, the Cooperative Congressional Election Study,  
24 and adding that to the mix. Although, I don't know that  
25 I've seen any studies using that to measure the impact of

1 photo ID laws.

2 But the main thing that's happened is the passage of  
3 time, which gives us more leverage on it. And so I have  
4 been seeing just recently some more studies that are kind  
5 of beginning to build a picture of what's going on.

6 Q And have more states also adopted voter  
7 identification laws since the time of this article?

8 A Yes.

9 Q Does that also give you more statistical leverage?

10 A Yes.

11 Q And you mentioned some recent studies. Are you  
12 familiar with the recent study conducted by the GAO?

13 A Yes.

14 Q I'm not going to ask you about the details of that  
15 because it will come up elsewhere, but how is the GAO  
16 regarded in terms of the quality of its studies within the  
17 profession?

18 A I think it's generally -- I say the term "*gold*  
19 *standard*" in terms of professionalism and the quality of  
20 the statistical research that they do.

21 Q And then last I want to ask you a couple of questions  
22 about the Carter-Baker report, which is Defendants'  
23 Exhibit 328. And I'm going to bring up a couple of pages  
24 to refresh your recollection with respect to some  
25 questions you were asked about before.

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MR. KAUL: Let's pull up Exhibit Page 27.

THE COURT: Page 27 of your Exhibit 328, correct?

MR. KAUL: That's right. It's a defense exhibit.

THE COURT: Defense Exhibit. Thank you.

MR. KAUL: And an actually, I guess it's 326 and 327.

BY MR. KAUL:

Q The bottom paragraph on Page 26, do you recall being asked about that? And it continues on to 27.

A Yes.

Q Am I right that you were asked about the portion that leaves off there?

A Are you pointing up or down?

Q The portion you were asked about left off at the word "Confidence"?

A I don't actually recall.

Q Fair enough. But the last sentence in that paragraph stated, "*We viewed the other concerns about IDs that they could disenfranchise eligible voters*" and I think there's a word there, "*have an adverse effect on minorites, or be used to monitor behavior as serious and legitimate, and our proposal below aims to address each concern.*"

Is that what the report stated to the best of your recollection?

A Yes.

Q And you talked earlier about what the Carter-Baker

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1 report had proposed with respect to aggressively reaching  
2 out to registered voters and get them IDs, right?

3 A That's correct.

4 Q And let me also ask you about Page 29 in this report.  
5 And these were some of the recommendations on voter  
6 identification, is that right?

7 A Yes.

8 Q And I believe you were asked about the first three of  
9 these. Does that look right?

10 A Let's see.

11 Q Let's look at all five of them.

12 A Yes.

13 Q Now, point Number 5 there was another recommendation  
14 there, right, or 2.5.5, I guess it is?

15 A Yes.

16 Q And this indicates that *"In the event there's a*  
17 *national identification card mandated, it should include*  
18 *information related to voting and be connected to voter*  
19 *registration."* Is that right?

20 A That's correct.

21 Q Now, I think you were asked about whether Virginia  
22 had made it easier to register on cross-examination by  
23 adopting on-line registration?

24 A Yes.

25 Q Do you know what percentage of individuals who lack

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1 DMV identification are on-line, or how that compares to  
2 the population at large?

3 THE COURT: At what point in time?

4 MR. KAUL: Currently.

5 THE COURT: Okay.

6 A Not offhand.

7 Q Is it your understanding that a number of voters lack  
8 access to the Internet?

9 A People do. Yes.

10 MR. KAUL: I have no further questions.

11 THE COURT: All right.

12 May the doctor be excused at this point?

13 MR. HEARNE: Yes, Your Honor.

14 THE COURT: All right. Doctor, thank you. You're  
15 excused. Thank you very much for your time in the case.

16 **WITNESS STOOD ASIDE**

17 MR. FINBERG: Your Honor, at this time, by agreement  
18 with the plaintiffs, and we've talked to the Court about  
19 this, we're going to call two witnesses on behalf of the  
20 defendants out of order due to their obligations next week  
21 with the primary.

22 THE COURT: That's fine. As I mentioned to  
23 yesterday, I'll give you-all as much latitude as possible.

24 MR. FINBERG: Thank you, Your Honor.

25 The first witness is going to be Myron Mcclees.

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1 THE COURT: Could you spell that last name for me,  
2 please.

3 MR. FINBERG: M-C-C-L-E-E-S-E.

4 THE COURT: All right. Very well.

5 MR. FINBERG: No E at the end, Your Honor.

6 We'll get him to spell his name on the record once  
7 he's on the stand.

8 THE COURT: Okay. I'm counting on you.

9 MR. FINBERG: And, Your Honor, we've prepared binders  
10 of the exhibits we intend to use with our witnesses so  
11 that they're not fishing through the various volumes  
12 there. So if it's all right with the Court, we'd like to  
13 give a copy to plaintiffs' counsel, put a copy on the  
14 stand, and we will provide a copy as well to the Court.

15 THE COURT: That will be fine.

16 Sir, if you would please raise your right hand, left  
17 hand on the Bible, and face the Clerk of the Court.

18 THE CLERK: You do solemnly swear that the testimony  
19 which you are about to give, in this case, before this  
20 Court, shall be the truth, the whole truth, and nothing  
21 but the truth, so help you God?

22 MR. MCCLEES: I do.

23 THE COURT: Have a seat on the witness stand.

24 MR. FINBERG: Your Honor, may I approach the witness  
25 stand to put the binder on there, please.

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1 THE COURT: Yes, sir.

2 Mr. McClees, if you would be kind enough to put your  
3 full name on the record, and spell your first and last  
4 name so my court reporter can make sure we have it  
5 correct?

6 MR. MCCLEES: Yes, Your Honor.

7 THE COURT: Go right ahead.

8 MR. MCCLEES: Myron Demarcus McClees. Myron,  
9 M-Y-R-O-N. Demarcus, D-E-M-A-R-C-U-S. McClees,  
10 M-C-C-L-E-E-S.

11 THE COURT: All right. Very well.

12 All right, Ms. Hart, go right ahead.

13 MS. HART: Thank you, Your Honor.

14 Whereupon, **Myron McClees**, having been  
15 duly sworn in, testifies as follows:

16 DIRECT EXAMINATION

17 BY MS. HART:

18 Q Good morning, Mr. McClees.

19 A Good morning.

20 Q Could you please describe your education background,  
21 starting after high school.

22 A Certainly. I went to Virginia Tech for undergrad.  
23 From there, I got a bachelor of science in psychology and  
24 a bachelor of arts in art history --

25 COURT REPORTER: Your Honor, I --

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1 THE COURT: Mr. McClees, you need to speak slowly so  
2 this young lady can take it down, okay.

3 MR. MCCLEES: My apologies, Your Honor.

4 A So a bachelor of arts in art history, with a  
5 concentration in classical studies, and a bachelor of  
6 science in psychology. After that, I went to the William  
7 & Mary School of Law, class of 2010.

8 Q Where are you currently employed?

9 A I'm currently employed with the Department of  
10 Elections, which was previously part of the State Board of  
11 Elections.

12 Q How long have you worked there?

13 A I have worked there for -- it will be five years this  
14 coming May.

15 Q And what is your current job title?

16 A I am a policy analyst.

17 Q Is that the job that you held the entire time that  
18 you've been there?

19 A Yes, it is.

20 Q As a policy analyst for the Department of Elections,  
21 do you typically have a role in pending or enacted  
22 legislation?

23 A Yes, I do.

24 Q What is your role?

25 A I draft -- sometimes I draft actual legislation where

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1 the genesis of it is the agency. So we have our agency  
2 bills, as well as I review various election-related bills  
3 that are introduced by the actual legislators themselves.  
4 We have three policy analysts, and so if it falls into my  
5 subject area then I would draft a legislative active  
6 summary on that legislation.

7 Q What is your subject matter area?

8 A My subject matter area is election day procedures,  
9 recounts, contests of elections. Things of that nature.

10 Q Are you familiar with SB1256?

11 A Yes, ma'am, I am.

12 Q Could you describe briefly your general understanding  
13 of SB1256?

14 A Certainly. SB1256 changed the identification  
15 standards for the Commonwealth of Virginia requiring  
16 different IDs, and all the IDs have photographs upon them.  
17 So, for instance, a social security card, which was  
18 previously acceptable, was no longer acceptable due to the  
19 lack of photo upon it, as well as the concealed handgun  
20 permit was removed. But there were others that were added  
21 on that also had photos.

22 Q How did you first hear about SB1256?

23 A I believe it was first referred to me by my immediate  
24 supervisor, Susan Lee. She stated to me that there was  
25 another photo ID bill that was coming down the pike, and

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1 so that's where I first heard about it.

2 Q So did SB1256 fall into your subject matter  
3 expertise?

4 A Yes, ma'am, it did.

5 Q So once you received SB1256, what did you do with it?  
6 What was your first step in the process?

7 A Certainly. The first step of the process, I looked  
8 at the summary of the bill to get a general idea of what  
9 the bill is going to try to accomplish. And then I look  
10 at the specific wording of the bill. From there, I would  
11 draft an LAS.

12 Q What is an LAS?

13 A Certainly. An LAS is a Legislative Action Summary.  
14 First things it asked for is the affected constituents of  
15 the bill. So I would look at how does it affect voters.  
16 How does it affect different members of the election  
17 community. How does it affect us as an agency. So that's  
18 the first section of a Legislative Action Summary.

19 The second section is recommendations. So on that  
20 area, I would cover things saying whether it was related  
21 to another bill, you know, was it completely synonymous  
22 with another bill that was introduced. Generally, how it  
23 would affect Virginia. How would it change all of our  
24 procedures. Does it even do what the sponsor thinks it  
25 does. Sometimes they don't.

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1 So I give all of those recommendations in a second  
2 section.

3 Q So did you draft a Legislative Action Summary  
4 regarding SB1256?

5 A Yes, ma'am, I did.

6 Q And did the agency provide that Legislative Action  
7 Summary to the governor's office?

8 A Yes, ma'am, it did. It goes through a couple of  
9 procedures internally before it gets all the way out of  
10 the agency.

11 Q And did the agency take a position on SB1256?

12 A No, ma'am. That one was a no position.

13 Q Did you personally attend committee hearings at which  
14 SB1256 was debated?

15 A Yes, ma'am, I did.

16 Q Which committees?

17 A That would be the subcommittee for Privileges and  
18 Elections in the Senate, as well as the full committee of  
19 the Privileges and Elections Committee in the Senate.

20 Q In your role as a policy analyst, is that something  
21 you typically do, attend committee hearings?

22 A Yes, ma'am, it is.

23 Q What is your role at those committee hearings?

24 A My role at the committee hearings, it can be two  
25 things. First of all, it can be if the sponsor of the

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1 bill needs specific information, that's normally an agency  
2 sponsored legislation. If they don't know the technical  
3 aspect of something, sometimes I give input there.

4 And then also just to hear exactly what is occurring,  
5 the debate on the bills, so that way I know -- first, it  
6 helps me know exactly what the sponsor intends for the  
7 bill to do, as well as it lets me know of other concerns  
8 that I can take into account when giving further input on  
9 the bill in a enrolled bill review, or when implementing  
10 the bill itself.

11 Q So what was your role when you attended the committee  
12 hearings specific to SB1256?

13 A Specific to SB1256, I wanted to see its progression  
14 to find out what the arguments were for and against. What  
15 were they attempting to accomplish. How I could go about  
16 implementing it. So just to get input to help me do a  
17 better job if it were to make it all the way through.

18 Q In the committee hearings that you attended, did  
19 anyone speak out in favor of the bill?

20 A Yes.

21 Q What were the general arguments in favor of the bill?

22 A The general arguments in favor of the bill were they  
23 were going to help reduce voter fraud. That was -- that  
24 was the main thing is just to avoid voter fraud, that I  
25 can remember specifically.

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1 Q So you drafted the legislative action summary, you  
2 attended the hearings, at what point does SB1256 come back  
3 inside the agency?

4 A Certainly. After it passes both Houses, we're asked  
5 to create a enrolled bill review. So after -- what we do  
6 at that point in time is we kind of do another LAS. But  
7 it takes into account we change the habit along the way  
8 during the process. So if this is amended in any way, we  
9 take that into account.

10 Also, sometimes arguments come up in the middle of  
11 committee meetings where things that I didn't anticipate,  
12 or I didn't look at from the specific wording of the bill,  
13 then I can put those into my analysis as well.

14 Q Does the agency also draft regulations with respect  
15 to bills that come back to it?

16 A The point of drafting regulations would be after the  
17 bill fully passes and is signed by the governor.  
18 Sometimes they're vetoed, and to draft an entire  
19 regulation and go through the regulatory process would be,  
20 you know, utterly superfluous is we were to -- if it were  
21 to be killed along the process. So we won't get involved  
22 in that portion of it until after it's fully signed and we  
23 know it's going to become law.

24 Q Is part of your role as a policy analyst to draft  
25 regulations?

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1 A Yes, ma'am, it is.

2 Q Did you end up drafting any regulations regarding  
3 SB1256?

4 A Yes, ma'am, I did. There was one that I drafted from  
5 scratch. It was 1 VAC 20-40-90, as well as I amended the  
6 definition section in 1 VAC 20-40-10.

7 Q All right. Talk to me about 20-40-90. What did you  
8 draft there?

9 A 20-40-90 states exactly what a person needs to do in  
10 order to obtain a free ID from our office. So that was  
11 basically stating that they need to fill out an  
12 application, they need to provide a signature. I think  
13 all the steps that are necessary there in order to -- for  
14 a person to get an ID are contained in 20-40-90.

15 Q Is that the regulation that you drafted first, and  
16 the bill came back after it was passed?

17 A Yes, ma'am.

18 Q All right. And then you mentioned 20-40-10. What is  
19 that?

20 A 20-40-10 is the definition section. And in there, I  
21 included a definition of what is a valid ID. So, in  
22 20-40-90, it states that a person without a valid ID can  
23 get a free ID from us. We needed to find exactly what is  
24 considered a valid ID, and so what's what I was putting  
25 into -- one of the things I specifically remember putting

1 in 20-40-10.

2 Q When you began drafting the definition of "valid,"  
3 where did you start?

4 A I started with our definition that we previously  
5 relied upon. So in the "What-If" document, it had  
6 "What-If" -- you know, what IDs would be acceptable at  
7 that point in time. So I started there and I worked out  
8 from there.

9 So I think that at that point in time, the definition  
10 of valid said that -- you know, valid and current said  
11 that it was either unexpired or expired within 30 days  
12 previously, so I worked from there and moved forward.

13 THE COURT: Did you come up with the expiration date  
14 restriction, or was that in the bill?

15 MR. MCCLEES: No, Your Honor, that was -- I came --  
16 we already had determined that it preexisted the passage  
17 of this, Your Honor. And then after -- but it wasn't  
18 based on a specific statute.

19 THE COURT: So the restriction on expired  
20 identification, was that by regulation or by statute?

21 MR. MCCLEES: That was by regulation, Your Honor.

22 THE COURT: Regulation issued by your office, right?

23 MR. MCCLEES: Yes, Your Honor.

24 THE COURT: All right.

25 Go right ahead, Ms. Hart.

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1 MS. HART: Thank you, Your Honor.

2 MR. MCCLEES: If I can just address something else  
3 for Your Honor?

4 THE COURT: All right. Go ahead, sir.

5 MR. MCCLEES: Certainly. I just wanted to state that  
6 the 30 days was not based on a regulation. The one that  
7 preexisted the drafting of -- my drafting of 20-40-10, it  
8 was just in guidance documents. It was not a regulatory  
9 standard, the 30 days, Your Honor.

10 THE COURT: So what expiration date did you-all  
11 publish by regulation?

12 MR. MCCLEES: By regulation, the first one that we  
13 published with the no expiration date -- the expiration  
14 date was inconsequential was the very first regulation  
15 that I passed in 20-40-10. We just had a general standard  
16 of 30 days, but it was not based on regulation before  
17 that.

18 BY MS. HART:

19 Q Why don't you walk us through the process. You had  
20 the 30-day guidance. You ultimately recommend something  
21 to the Board. Walk us through the process.

22 A Certainly. So in the first version I brought before  
23 the Board, I had a definition of valid. It had other  
24 things within it.

25 Q And if I may interrupt you. Just for now, specific

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1 to the expiration date, what were your recommendations,  
2 what did the Board --

3 A Certainly. I had no recommendations in my very first  
4 version I brought before the Board for consideration.  
5 With a regulatory process, you bring forward a regulation,  
6 it's reviewed, then the Board can vote to put it up for  
7 public comment.

8 After a public comment period, then the Board can  
9 fully adopt the regulation at that point in time. So the  
10 very first time I brought it up, I believe it was in  
11 February of 2014. I brought a regulation -- it did not  
12 state anything specific to expiration dates. At that  
13 point in time, the vice chair during the hearings asked me  
14 about --

15 THE COURT: Your suggested regulation did not have an  
16 expiration date, right? It was "*inconsequential*," as you  
17 called it?

18 MR. MCCLEES: Yes, sir. Well, I -- okay. What  
19 happened was that the -- I was not addressing expiration  
20 within the first version I brought; however, during the  
21 hearing, it was -- I was specifically asked how do we  
22 handle expired IDs. It was there that I had informed the  
23 Board on what our current standard was, which was that we  
24 have guidance documents saying that if they're expired for  
25 30 days, or less, then they'll be acceptable.

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1 It was at that time that the Board -- or two members  
2 of the Board stated that they did not like that standard,  
3 and they wished for me to address that standard in the  
4 final version of the regulation that I was to bring to  
5 them.

6 THE COURT: So as a result of that Board meeting, no  
7 resolution of that issue occurred, is that right?

8 MR. MCCLEES: That is correct, Your Honor.

9 THE COURT: They asked you to study it?

10 MR. MCCLEES: They wanted me to put it for public  
11 comment.

12 THE COURT: Okay.

13 MR. MCCLEES: Yes, Your Honor.

14 THE COURT: Take it from there. What happened?

15 MR. MCCLEES: Yes, Your Honor.

16 A So at that point in time, I drafted the regulation  
17 fully for 20-40-10. It did not specifically state  
18 expiration upon it because both the chair and the  
19 vice-chair stated that they did not want an expiration  
20 date to affect the acceptability of the document for  
21 identification purposes. So I drafted the regulation  
22 saying that here are the criteria to be taken into account  
23 for whether a ID is valid, and it did not have expiration  
24 within it.

25 So, by omission --

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1 COURT REPORTER: Sir, can you please slow down.

2 MR. MCCLEES: I apologize, ma'am.

3 COURT REPORTER: I appreciate it. Thank you.

4 A So, by omission, the fact that I stated these are the  
5 criteria that can be considered when considering whether  
6 an ID is valid, then all IDs that are expired would be  
7 allowed. When I brought this before the Board, the Board  
8 stated they wanted a specific statement within the  
9 regulation that stated that unexpired IDs were acceptable.  
10 And when I said "*the Board*," I mean the chair and the  
11 vice-chair.

12 So from there, I -- during the meeting, they -- I  
13 went upstairs. This meeting was held in the basement of  
14 our building. I went upstairs, put together a sentence,  
15 brought it back down, passed out copies of my proposed  
16 language, and the Board adopted that into 20-40-10 for  
17 their final version.

18 THE COURT: And just to clarify, that amended  
19 language indicated that there was no expiration date  
20 requirement on the ID for it to be valid, is that correct?

21 MR. MCCLEES: Yes, Your Honor.

22 THE COURT: Okay.

23 Ms. Hart, go ahead.

24 BY MS. HART:

25 Q In the currently operable language of the

1 regulations, is there an expiration date?

2 A Yes, ma'am.

3 Q What is the regulation on that?

4 A The regulation now currently states that it's -- an  
5 ID is valid if it is unexpired or expired for 12 months or  
6 less.

7 Q How did it get from a 30-day expiration date, to no  
8 expiration date, to 12 months?

9 A Sure. The original version that passed, I want to  
10 say it was June of 2014, had the language that I was  
11 speaking about stating that the expiration date was  
12 inconsequential. I left on vacation. I came back from  
13 vacation, and I heard that there was concern about this in  
14 that the Board opened it up for public comment again, and  
15 they wished to put a time period on when ID -- expired is  
16 to be acceptable.

17 Q So the public comment is what initiated the 12-month  
18 expiration date -- expiration limitation?

19 A I would state there were other pressures that were  
20 put upon -- there were -- it was the genesis was the  
21 Board. I think the chairman changed his mind on the idea,  
22 and that is what promoted the public comment. It wasn't  
23 just public comment came out of nowhere. It was the Board  
24 wanted to put it up for public comment because they wished  
25 to make a change. And then after that there was a public

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1 comment period, a full public comment period, we received  
2 more public comment than I had ever seen on any regulation  
3 at that point in time.

4 THE COURT: Explaining to me how you conduct the  
5 public comment. What is the vehicle you use, and how many  
6 responses did you get in this case, if you know?

7 MR. MCCLEES: Yes, Your Honor. What we do is we take  
8 the regulation, we put it up on Virginia Town Hall. It's  
9 a Website that all Virginia agencies use when putting  
10 forward proposed regulations, Your Honor.

11 THE COURT: And that allowed viewers to respond, I  
12 assume?

13 MR. MCCLEES: Yes, Your Honor, it does.

14 THE COURT: Okay.

15 MR. MCCLEES: And I believe we received over 500  
16 comments on that one. And just to give Your Honor an  
17 idea, on most regulations, I might get 12 comments.  
18 Somewhere in there. Less than 20, certainly. And so this  
19 was certainly way more than I was accustomed to.

20 THE COURT: Go right ahead, Ms. Hart.

21 BY MS. HART:

22 Q And in your practices and procedures, do you provide  
23 those public comments to the Board for their review?

24 A Yes, ma'am, I do.

25 Q So ultimately the Board passed a 12-month expiration

1 limit?

2 A Yes, ma'am. It did.

3 Q Would it be fair to characterize that as a  
4 compromised position?

5 A Yes. There was a -- there were people asking for no  
6 expired IDs within some of the comments. There were  
7 people asking for absolutely unexpired IDs, which is the  
8 version that they had previously adopted. So, to say, you  
9 know, certainly one year falls between nothing and  
10 something. So, certainly.

11 Q Fair enough. So after SB1256, you drafted the  
12 regulations, the regulations were adopted, were you  
13 involved in any outreach efforts to educate the community  
14 on the new law and the regulations that implemented it?

15 A Yes, I was to an extent. Certainly.

16 Q Were you specifically involved in any outreach  
17 efforts to the African-American community regarding  
18 SB1256?

19 A Yes.

20 Q Could you describe those efforts?

21 A Certainly. I met with the NAACP in Hanover County at  
22 one point in time.

23 THE COURT: What county?

24 MR. MCCLEES: Hanover County.

25 THE COURT: Hanover County.

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1 A I also met with -- let's see. There was a letter  
2 that went out to the clergy. To the members of the black  
3 clergy. A lot of them were in highly populated areas -  
4 Tidewater, Richmond. So I sent out a letter to them,  
5 along with a flier, I believe, that explained the voter ID  
6 standard.

7 Q Let's start with your presentation to the NAACP. How  
8 was it that you came to speak in front of the NAACP in  
9 Hanover County?

10 A I believe that the registrar, Teri Smithson, asked  
11 the agency to -- you know, said that she was going to be  
12 speaking with NAACP, and asked us for information. And we  
13 volunteered to actually come and speak ourselves if she  
14 wanted. And she jumped at the opportunity.

15 Q And the information that you provided the  
16 African-American churches, what prompted you to do that?

17 A If I remember correctly, I believe it was Don Palmer,  
18 the secretary of the agency. I believe he stated he had a  
19 list of people that he wished to send this out to. So I  
20 drafted an e-mail, and sent out the materials.

21 Q And it was your understanding that those were clergy  
22 members?

23 A Yes. I believe they were clergy members. And I'm  
24 positive that at least of them was because it went to the  
25 church that my mother attends.

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1 Q All right. Did you speak at any other meetings where  
2 the NAACP had a presence?

3 A Yes, I did. There was a meeting to be held at the  
4 Patrick Henry Building where the NAACP was one of them.  
5 There were multiple other organizations there; Virginia  
6 Majority League, Women Voters. I remember that we were  
7 talking about how we were going to get the word out to the  
8 public about the voter ID change.

9 Q So at that particular meeting at the Patrick Henry  
10 Building, you were not only working with those groups to  
11 figure out how to get the word out, but also describing  
12 what the new law was?

13 A Certainly. But mind you, this is a very savvy group,  
14 so a lot of them know what the standard is. But,  
15 certainly, I was in the room to help make sure that we  
16 were fully describing the law correctly and talking about  
17 things that were within the proper procedures.

18 Q Do you know if the SBE conducted any specific voter  
19 outreach to the poorer communities?

20 A Let's see. Oh, yes. When it comes to -- there was a  
21 meeting that we had with Virginia Organizing in  
22 Charlottesville. I remember that one. And Virginia  
23 Organizing, they have groups that there within -- they  
24 have branches that are within Richmond, Petersburg,  
25 Danville. And I remember that meeting as well.

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1 Q Can you describe the typical demographic that  
2 Virginia Organizing services?

3 A I would say it was lower income, as well as minority  
4 groups.

5 Q Did the SBE do any outreach in the Latino community?

6 A I know that we had to produce all of our -- any  
7 official document we had to produce in Spanish as well  
8 for -- specifically for -- because Fairfax County, they  
9 are covered under Section 205 of the Voting Rights Act,  
10 and so therefore they have to produce things in a minority  
11 language, specifically Spanish for Fairfax.

12 Q What about on-line? Did the SBE undertake to educate  
13 the public via any on-line method?

14 A Yes. I believe we changed our voter ID chart. Our  
15 materials on the Website were changed to reflect the -- to  
16 guide the voters. In addition, we have a full section  
17 that talks about voter ID law on the Website now.

18 Q Which Website is that?

19 A Elections.Virginia.gov.

20 Q Did you make any specific efforts to target --  
21 outreach efforts specifically to target those groups that  
22 had been opposed to the bill during committee hearings?

23 A Well, certainly. First of all, the Patrick Henry  
24 meeting, you know, all the groups that were there were  
25 groups that worked on it that specifically spoke against

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1 the bill during its consideration in the General Assembly.

2 Q Why were you targeting them specifically?

3 A Because they had certain concerns about making sure  
4 that the voters were able to get a hold of IDs. You know,  
5 these groups were certainly against the idea of the bill.  
6 But they wanted to make sure that the impact of the bill  
7 wouldn't affect, you know, voters that didn't have IDs.  
8 You know, that they would be given a proper opportunity.

9 Q Did the SBE provide any guidance materials to the  
10 general registrars specifically regarding implementation  
11 of 1256?

12 A Certainly.

13 Q Did you have any role in drafting those guidance  
14 materials?

15 A Certainly. So, for instance, the GRE book, I would  
16 certainly draft chapter -- well, not draft chapters. I  
17 would edit chapters because it's a preexisting document.

18 In addition, there was a "What-If" guide for them.  
19 There was a webinar for them that I conducted. Multiple  
20 webinars for them that I conducted. So there were  
21 multiple outreach efforts for the general registers that I  
22 was involved in. Certainly.

23 Q Let's start with the GRE handbook.

24 MS. HART: I would like to introduce Defendants'  
25 Exhibit 404.

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1 THE COURT: When you say "*introduce*," you're moving  
2 that into evidence?

3 MS. HART: I would like to if I've laid an adequate  
4 foundation.

5 THE COURT: Pardon?

6 MS. HART: If I've laid an adequate foundation, yes,  
7 I'd like to.

8 THE COURT: I don't know that you've laid any  
9 foundation at all at this point, frankly.

10 MS. HART: Well, may I show him the document?

11 THE COURT: Yes, ma'am. You may go right ahead and  
12 do that.

13 Is there any objection to 404? If there's not, I'll  
14 just go ahead and let it in.

15 MR. KAUL: I believe there's not, Your Honor. And to  
16 be clear, we don't have any objection to them publishing  
17 their documents as they're establishing foundation.

18 THE COURT: That will make things very easy.

19 If they don't object to it, we'll admit 404.

20 MS. HART: Thank you.

21 (Defendants' Exhibit 404 is received.)

22 THE COURT: And 404, again, Ms. Hart, what is that?

23 MS. HART: It's the general registrar's handbook.

24 THE COURT: Thank you.

25 BY MS. HART:

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1 Q And I'd like to shortcut this 500-page document by  
2 asking if --

3 THE COURT: That would be appreciated.

4 BY MS. HART:

5 Q If you flip to Page 490, I believe Tab 29  
6 specifically deals with provisional voting.

7 You can use either one.

8 A I'll use the screen. Thank you.

9 Q Do you recognize the document in front of you?

10 A Yes, ma'am, I do.

11 Q What is that?

12 A This is Chapter 29 of the GRE book. And Chapter 29  
13 specifically deals with provisional voting.

14 Q Did you have a hand in drafting Chapter 29 regarding  
15 provisional voting?

16 A Yes, ma'am, I did.

17 Q Can you just walk us through the recommended process  
18 for provisional voting that you provided to the general  
19 registrars through the handbook?

20 A Certainly. So a lack of -- a person that  
21 provisionally votes due to lack of ID is different from a  
22 regular provisional voter. A regular provisional voter,  
23 there's a possibility of their situation be ameliorated  
24 without any action whatsoever by the voter.

25 However, when it comes to voter ID, the statute

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1 specifically states that the voter is to provide a copy of  
2 their photo ID in order for their ballot to be accepted.  
3 So we have a whole different procedure that's involved  
4 there. There's a separate provisional ballot envelope  
5 that colloquially is referred to as the "lime green," or  
6 voter ID envelope. And that one is specifically for  
7 voters who lack IDs, and is easily discernible from the  
8 other darker green envelope that is normally.

9 One of the reasons we did that is because the general  
10 registrar could separate them before the canvas of the  
11 ballots, knowing that these you only act on when you get  
12 something from the voter, and these you will actually need  
13 to do research before the full canvas.

14 In addition, on the regular ballot envelope, we had  
15 to establish a check box for a person who was a compound  
16 provisional voter. So let's say somebody is already  
17 marked at the poll books having, plus they lack ID, that's  
18 a compound situation where there's two deficiencies that  
19 we have. And so in that situation, we added a check box  
20 so that we could fully demark that on the regular  
21 envelope. As well as we just guide them on accepting the  
22 copies of the IDs through e-mail, things of that nature,  
23 and to provide that to the Board.

24 Q When you say you "guide them on accepting copies of  
25 the IDs," do you mean after the voter has cast a

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1 provisional ballot, and that would be the curing process?

2 A Yes, ma'am.

3 Q How did you communicate these procedures to the  
4 general registrars?

5 A We have annual training that we conduct, as well as  
6 we had webinars on this. We had also -- let's see, with  
7 this one -- well, of course the GRE book itself is  
8 involved. So there were multiple things to specifically  
9 get this information out because it was a brand-new  
10 process for everyone.

11 Q How did you distribute the GRE handbook among the  
12 general registrars?

13 A Sure. Every year, we updated the GRE book, and make  
14 it available, before July 1 when legislation goes into  
15 enactment. So once it's all fully available, we send a  
16 communication out to the field and let them know that the  
17 GRE book is ready, and they can, therefore, go ahead and  
18 start reviewing it, printing it for their purposes.

19 Q Where is the GRE handbook available?

20 A It's available through our Website as well. So I  
21 know there was a Town Hall, which I -- a Town Hall Website  
22 which I previously mentioned. I know it's available  
23 there, as well as there are certain Share Point, which is  
24 something internal to our agency as well as the general  
25 registrar electoral community. It's also available

1 there.

2 Q And you mentioned Town Hall. Is that a publically  
3 accessible Website?

4 A Yes, ma'am, it is.

5 Q So the general public could have access to the GRE  
6 handbook if they wanted it?

7 A Yes, ma'am, they could.

8 Q Did the SBE provide any guidance materials  
9 specifically geared towards election officials?

10 A Well, certainly. So this was geared towards, you  
11 know, general registrars who are considered election  
12 officials. But also Officers of Election, we have  
13 guidance documents that are specifically geared towards  
14 them. And the What-Ifs document is certainly one of  
15 those.

16 Q Could you briefly describe the difference between an  
17 election official and a general registrar?

18 A Sure. Can I say Officers of Elections? Is that  
19 okay? I'm kind of statute guy.

20 Q Please. My apologies.

21 A Certainly. Officers of Election are people who man  
22 the polling places on election day. And so they're  
23 registered voters, but it's not "*their day job*." Where  
24 general registrars are people who are responsible  
25 year-round for registering, applications, and taking care

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1 of general election matters. And they are under an  
2 electoral board who oversee them.

3 Q So did the SBE undertake any educational efforts to  
4 communicate information to the boots on the ground, the  
5 Officers of Election, regarding the new regulations?

6 A Yes, ma'am. With the What-If guide, certainly. As  
7 well, I believe, we have also other training available,  
8 and training tools available.

9 MS. HART: All right. If there's no objection, I'd  
10 like to introduce Defendant's Exhibit 69-A, the What-If  
11 Guide.

12 THE COURT: What's the number again?

13 MS. HART: S 69-A.

14 THE COURT: Okay.

15 MR. KAUL: No objection. Although, if you could just  
16 let us know what the date is because I think we both have  
17 some in our exhibit list.

18 MS. HART: I believe it's August 2014.

19 MR. KAUL: Thank you.

20 THE COURT: That's the date of the document?

21 MS. HART: Yes.

22 THE COURT: Go ahead.

23 (Defendants' Exhibit 69-A is received.)

24 BY MS. HART:

25 Q Do you recognize the document in front of you?

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1 A Yes, ma'am, I do.

2 Q What is that document?

3 A This is the What-If document. The August 11, 2014  
4 version.

5 Q Did you have a hand in drafting that document?

6 A Yes, ma'am, I did.

7 Q What is the purpose of the document?

8 A The purpose of the document is to provide an easy  
9 guide for Officers of Election to handle specific issues  
10 that they might face in the polling place on election day.

11 Q Why don't we cut to the chase. If you can turn to  
12 Page 13 of that document. What does Page 13 describe?

13 A This describes the provisional ballot process for  
14 when a person lacks ID, and how to process a voter who  
15 lacks ID.

16 Q Can you just walk us through the process as you  
17 communicated it to the Officers of Election?

18 A Sure. In that situation, the voter is to be --  
19 they're given an envelope. They're to enter the voter's  
20 information on the log, the provisional ballot log, which  
21 kind of serves as the poll book for provisional voters.  
22 They're also to mark that photo ID is the reason the  
23 person is voting the provisional ballot.

24 They're also to place it in the sealed lime green  
25 envelope, and sign the lime green envelope. And it's to

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1 be -- then they're to be provided a provisional ballot --  
2 a provisional ballot notice of identification, which gives  
3 them the information necessary to ameliorate and have  
4 their ballot counted.

5 Q Did you draft the provisional voter notice document?

6 A Yes, I did.

7 Q What guidance does that give the voter who has just  
8 cast their provisional ballot?

9 A Sure. It let's them know that the reason that  
10 they're voting provisionally is due to lack of ID. And  
11 let's them know they have until Friday noon -- the Friday  
12 following the election day at noon to provide a copy of  
13 their ID in order to have their ballot counted. And that  
14 they can do so through e-mail, fax, as well as within the  
15 registrar's office.

16 And it provides the specific -- and then the  
17 registrars fill that specific information in - their fax  
18 number, their e-mail address, their specific office  
19 address. That is all, you know, specifically put in there  
20 by the general registrars.

21 Q Does it mention the free voter ID?

22 A Yes. The current version specifically mentions that  
23 a person could obtain a free ID just by applying at their  
24 registrar's office.

25 Q And is that a notice that the Officers of Election

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1 are required to provide to voters who cast provisional no  
2 ID ballots?

3 A Yes, ma'am.

4 Q How did the SBE communicate these What-If guidance  
5 documents to the Officers of Election?

6 A This is one of the election day documents that is  
7 specifically required to be given to the Chief Officer of  
8 Election for every polling place. So there's multiple  
9 things that are to be given to those Chief Officers of  
10 Election. This is among them. As well as it's publicly  
11 available on our Website. But it is certainly an election  
12 day document that must be provided over to the polling  
13 place.

14 Q How does the document make its way from the SBE to  
15 the Officers of Election?

16 A What we do is we normally send something out to let  
17 the general registrars know that the document is final.  
18 They print it off.

19 Also, I believe in our Share Point, when we edit  
20 these documents, there's a check box to say that this is  
21 an election day document. I believe that they're given  
22 the ability to just print out all election day documents,  
23 and they will print them all out, and go over them, is my  
24 understanding of the technical aspect.

25 Q Is it your understanding that the general registrar

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1 is the entity responsible for ensuring that the Officers  
2 of Election have these document?

3 A On the ground what normally happens is the general  
4 registrar does that. Statutorily, it might be an  
5 Electoral Board duty. But who normally handles this,  
6 from my experience, is it's always the general registrar  
7 that handles this sort of thing.

8 Q And is that document, the What-If guide, specifically  
9 also publically available?

10 A Yes, ma'am, it is.

11 Q It's on the Town Hall?

12 A Yes, ma'am, it is.

13 Q Is it on the SBE's Website?

14 A I believe what happens now with Town Hall, and with  
15 our Website, is I believe it directly hyperlinks to a page  
16 with our forms warehouse, and it's within the forms  
17 warehouse.

18 Q And that's a document that if I went on-line I could  
19 find?

20 A Yes, ma'am, you could.

21 Q You mentioned that you attended these committee  
22 hearings on SB1256, is that right?

23 A Yes, ma'am.

24 Q And one of the topics of the hearings was voter  
25 fraud?

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1 A Yes, ma'am. Certainly.

2 Q Do you recall any debates specific to voter fraud?

3 A Yes, ma'am, I do. Certainly.

4 Q What was the nature the concerns expressed with  
5 respect to voter fraud?

6 A I believe that there were a lot -- multi groups who  
7 were stating that there is no voter fraud, or no  
8 discernable voter fraud; therefore, to try to create a  
9 standard that gets rid of voter fraud that doesn't exist,  
10 that that shouldn't be undertaken at all. They were  
11 stating that, you know, this is being enacted for other  
12 reasons other than for voter fraud.

13 And so that was an argument that was consistently  
14 levied during the meetings. And I specifically remember  
15 the counter to that was Senator Garrett who said that he  
16 had prosecuted voter fraud.

17 Q Are you aware of any ways in which SB1256, and any  
18 regulations that you drafted, would combat voter fraud?

19 A Well, certainly. If a person is going -- if a person  
20 is going to attempt to vote in my name, and they lack any  
21 sort of document stating my name, and everything, and they  
22 go and attempt to vote, they would be thwarted by this  
23 law. Sure. So I guess in that situation.

24 Q And you've also mentioned a public comment period.

25 As part of your job, did you review and respond to any

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1 constituent complaints with respect to SB1256?

2 A Well, certainly. Yes.

3 Q And is that also true in general -- during any  
4 regulation, any law that affects election procedures,  
5 would you be the recipient of those constituent  
6 complaints?

7 A If they fall into my subject area, then, yes, a lot  
8 of times they'll make it to my desk.

9 Q If I refer to SB1, do you know what I'm talking  
10 about?

11 A Yes. I believe that was the previous photo ID.

12 Q The 2012 voter ID law?

13 A Yes.

14 Q Does that sound right?

15 A Yes.

16 Q After SB1, the 2012 law was passed. Do you recall  
17 receiving any constituent complaints regarding that bill?

18 A Yes. Yes.

19 Q Could you describe the general nature of those  
20 complaints?

21 A We would have some people arguing that it was  
22 unnecessary, and then we would have people who were  
23 arguing that they needed to be more stringent.

24 Q What was the prevailing sentiment? What the majority  
25 of the complaints?

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1 A The majority were actually asking for something more  
2 stringent.

3 Q Do you also field constituent complaints on election  
4 day?

5 A Yes, I do.

6 Q On election day in 2015, do you recall receiving any  
7 constituent complaints specific to the photo ID law?

8 A Yes, I do.

9 THE COURT: What year were you talking about,  
10 Ms. Hart?

11 MS. HART: In 2014.

12 THE COURT: Go right ahead with your question. I'm  
13 sorry for interrupting you.

14 BY MS. HART:

15 Q How do constituent complaints find their way to you  
16 on election day?

17 THE COURT: Did you get an answer to the prior  
18 question?

19 MS. HART: I'm just trying to lay the foundation for  
20 what he's about to talk about with respect to the specific  
21 complaints.

22 THE COURT: All right. Go right ahead.

23 A I'm sorry. Could you restate your question?

24 Q Sure. How do constituent complaints find their way  
25 to your desk on election day?

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1 A Sure. We normally have a phone bank of multiple  
2 people who handle what we consider Tier 1 level things.  
3 Inquiries such as where is my polling place. Things like  
4 that. How long are the polls open for.

5 Then we have, you know, if the person asking the  
6 question is how -- you know, it merits more -- it's  
7 unique, more of an expertise in order to answer, then they  
8 work their way up the chain until eventually it gets to  
9 me, is my understanding of how it works.

10 So unless they are asking something that is policy  
11 based, then it would specifically be routed towards or me,  
12 or one of the other policy analyst, or somebody else  
13 within the agency whose expertise it falls under.

14 Q So in 2014, did you field any specific constituent  
15 complaints regarding the photo ID law?

16 A Oh, certainly.

17 Q Approximately, how many did you receive?

18 A On election day or in general in 2014?

19 Q On election day through whenever those provisional  
20 voters could cure.

21 A Okay. Yes, I received people who were stating that  
22 they weren't able to vote because they didn't have an ID.  
23 I had some people who stated that they had to cast a  
24 provisional ballot because somebody -- an Officer of  
25 Election had challenged their ID on the fact that it

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1 didn't have an address, which greatly upset me. So there  
2 were multiple that I received on that day.

3 Q How did you address those constituent complaints?

4 A Normally what I do is if I can give specific  
5 information to empower the voter to handle it, I do that  
6 specifically on the phone. And thereafter, if this is a  
7 misapplied standard, which is the case when somebody says  
8 that the voter ID has to have an address on it, in that  
9 situation I contact the general registrar for the locality  
10 that it's in, and informing them so they can get  
11 specifically get in contact with that polling place to  
12 make sure that they immediately curtail that and hopefully  
13 ameliorate the entire situation.

14 Q Is that what you did in 2014 in response to the  
15 constituent complaints you received?

16 A Yes, ma'am, it is.

17 Q Can you specifically identify a single individual  
18 voter who was wrongly denied the right to vote in 2014  
19 based on the photo ID law?

20 A Sure. I remember this lady in northern Virginia,  
21 Ms. Cotten.

22 Q And how is it your understanding that she was wrongly  
23 denied the right to vote?

24 A If I remember correctly, she didn't have one of the  
25 IDs, but I don't remember her being given the opportunity

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1 to cast a provisional ballot, is my understanding. That's  
2 my recollection.

3 Q Did you get in contact with her specifically?

4 A I did. I did. I spoke with her. And that was the  
5 first time I had ever spoken with somebody who hadn't been  
6 offered a provisional because of lack of ID.

7 Q What kind of guidance did you give her on election  
8 day?

9 A I stated to her what the specific forms of  
10 identification were. At this point in time, the polls  
11 hadn't closed, so I was trying to see if she would be able  
12 to retrieve an ID, and get back to the polling place. And  
13 so that's what I was worried about was her being able to,  
14 you know, fully cast a ballot.

15 Q Did you explain to her the process of provisional  
16 voting?

17 A Yes, I did. I specifically -- I don't specifically  
18 remember whether or not she already knew about provisional  
19 voting, but I specifically talked about provisional  
20 voting.

21 Q What about on election day in 2015, do you recall  
22 receiving any constituent complaints specific to the photo  
23 ID law?

24 A Certainly, yes.

25 Q Approximately, how many complaints did you receive in

1 2015?

2 A I would say around 10 or so. Somewhere in there.

3 Q Did you personally respond to those complaints?

4 A Yes, ma'am, I did.

5 Q What did you do to address the constituent complaints  
6 regarding the photo ID law in 2015?

7 A The same as I always did in 2014. Empower the voter  
8 with information as much as I possibly could. And if they  
9 can ameliorate, great. If not, I would -- either way, I  
10 was going to contact the general registrar and inform them  
11 that the standard has been misapplied, if the standard is  
12 being misapplied, in the polling place.

13 Q Can you specifically identify a single voter who was  
14 wrongly denied the right to vote in 2015 based on the  
15 photo ID law?

16 A In 2015, I don't really remember. It doesn't stick  
17 out. I just remember Ms. Cotten because she specifically  
18 stuck out.

19 THE COURT: You remember who?

20 MR. MCCLEES: Ms. Cotten.

21 THE COURT: That was in 2014.

22 MR. MCCLEES: That was in 2014. That's why I  
23 remember that one. But I don't remember a specific one  
24 from 2015.

25 MS. HART: Thank you, Mr. McClees.

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1 I have no further questions.

2 THE COURT: All right.

3 Cross-examination of Mr. McClees.

4 MR. KAUL: Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 BY MR. KAUL:

7 Q Mr. McClees, good morning.

8 A Good morning, sir.

9 Q Let me introduce myself. I'm Josh Kaul. I'm one of  
10 the lawyers for the plaintiffs in this case. And you were  
11 deposed before by my colleague, Ms. Cherry, is that right?

12 A Yes, I was. She's very good, by the way.

13 Q We agree.

14 Let me ask you a few questions about some of the  
15 topics that you've been discussing today. But I guess  
16 before I do that, I just want to be clear about a couple  
17 of things. You're the lead policy analyst for the  
18 Department of Elections for voter ID?

19 A For voter ID. Yes.

20 Q Okay. And let me bring you back in time a bit. When  
21 you started working at what was then the State Board of  
22 Elections, the rules in place allowed a voter to cast a  
23 ballot with an affirmation of identity, is that right?

24 A Yes, sir, that is correct.

25 Q And you're not aware of any election administration

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1 problems that occurred with an affirmation of identity,  
2 right?

3 A No, sir.

4 Q And in 2012, I new voter ID bill was placed that put  
5 in place that eliminated the affirmation of identity, but  
6 expanded the number of forms of ID that could be used,  
7 right?

8 A Yes, sir.

9 Q And you're not aware of any fraud in 2012 that  
10 occurred with that voter ID law in place, are you?

11 A No. Fraud isn't something normally that I handle.

12 Q Let me ask you about a few questions towards the end  
13 of your examination there. Do you remember discussing a  
14 provisional voter notice document that's given to  
15 provisional voters?

16 A Yes, sir.

17 Q Now, that form provides various information about how  
18 a voter can cure a provisional ballot, right?

19 A Yes, sir.

20 Q But it does not tell a voter how they can get a free  
21 ID, does it?

22 A Yes, the current version does. Certainly.

23 Q How long has that version been out?

24 A I don't know, specifically. But the current version  
25 does state how you go about getting a free ID.

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1 Q Was that version in place for prior elections?

2 A I think it was in place especially for 2015. I don't  
3 know the timeline of whether it was available in 2014 or  
4 not.

5 Q Okay.

6 THE COURT: Do you know whether the current version  
7 is on your Website, Mr. McClees?

8 MR. MCCLEES: I'm speaking about the current version  
9 of the provisional voter notice/identification, Your  
10 Honor.

11 THE COURT: Okay. Thank you.

12 MR. MCCLEES: Certainly.

13 BY MR. KAUL:

14 Q And when a voter casts a provisional ballot, they're  
15 given an envelope that's a particular color, right?

16 A Yes.

17 Q And it's meant to be distinctive?

18 A Yes.

19 Q What's that color?

20 A It's a lime green color. I think it's officially  
21 called vulcan green, I want to say. But we call it lime  
22 green.

23 Q Okay. And there's another color called bolt, which  
24 is like the Highlighter color. So vulcan green, I'll add  
25 that to my list.

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1 A Yes.

2 Q And you were discussing the handbook that you guys  
3 use?

4 A Yes, sir.

5 Q And I think we said that was 500 pages, is that  
6 right?

7 A I'll defer to you-all. I just review my chapters,  
8 and then I luckily check that box off and walk away.

9 Q It's several hundred pages long, right?

10 A Yes, sir. It certainly is.

11 Q And have you ever read it all the way through?

12 A I have. When I first started with the agency, I  
13 wanted to get abreast as possible on all of our processes.  
14 So, yes, I did read it when I first joined the agency.

15 Q Do you know how many people read that the full way  
16 through?

17 A It would be my hope that every registrar reads it all  
18 the way through. But judging by some of the calls I get,  
19 I don't know.

20 Q The calls would indicate that they don't read it all  
21 the way through, right?

22 A I get calls on weapons in the popping place all the  
23 time. And, you know, there's a specific section --  
24 specific details of weapons in the polling place. So that  
25 one, yeah.

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1 Q But it's 500 pages long, so you can forgive the  
2 registrars for not remembering all the details, right?

3 A I'm not the best at forgiveness.

4 Q Fair enough.

5 Do you know how many of the pages in that book relate  
6 to photo ID?

7 A I don't know specifically how many of them relate to  
8 photo ID.

9 Q I don't know if we have Plaintiffs' Exhibit 155  
10 loaded. Well, actually before I bring this up, let me ask  
11 you, you said that you thought the provisional notice that  
12 was in place in 2015 had directions for how to get a free  
13 ID?

14 A I believe so, yes.

15 Q What about the one for 2014?

16 A I can't guarantee on that one. I specifically  
17 remember someone bringing to my attention that you needed  
18 to have it, and we included it in there. So I don't know  
19 the timeline fully on that.

20 Q If I showed you a copy of that, would that refresh  
21 your recollection?

22 A Perhaps.

23 MR. KAUL: This is going to be Plaintiffs' Exhibit  
24 155 at Page 26.

25 THE COURT: When you say "*a copy of that*," a copy of

1 what?

2 MR. KAUL: Thank you, Your Honor. The 2014  
3 provisional voter notice.

4 THE COURT: Okay.

5 MS. HART: I have no objection, Your Honor.

6 THE COURT: All right. It will be received.

7 (Plaintiffs' Exhibit 155 is received.)

8 BY MR. KAUL:

9 Q What page did I give you? Sorry. On the bottom  
10 there should be a page number.

11 A It is VSBE 0045909.

12 Q All right. And it's up on the screen now, too. Does  
13 that appear to you to be a copy of the notice that was  
14 used, at least in 2014?

15 A I -- it's hard to tell based on the revision number  
16 down at the bottom. But I think that revision numbers are  
17 one of those things where you will update a document, and  
18 whether or not the revision of it really gets changed, I  
19 worry about that.

20 Now, to let you know, this document did not  
21 previously --

22 Q Well, let me ask you, and direct your attention to  
23 the middle. Do you see where it indicates that this  
24 relates to photo ID, specifically?

25 A Yes.

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1 Q So this must have been for at least the first photo  
2 ID election, right?

3 A I would imagine so. I would imagine so.

4 THE COURT: If he doesn't know, he doesn't know. He  
5 said a couple times that he's unsure.

6 MR. KAUL: He did, Your Honor. And I thought maybe  
7 looking at that part of the document might help him.

8 THE COURT: All right. That's fair.

9 A There's things that would lead me to believe that  
10 this would be after the passage of 1256 based on the  
11 acceptable forms of identification. Within there, it's  
12 only listing photo IDs. It doesn't list, you know, a  
13 current utility bill, bank statements. So I think this is  
14 based on the 1256 standard as opposed to the SB1  
15 standards. And that would lead me to believe that, yes,  
16 this would be one that was after the passage of 1256.

17 Q Okay. And just so we're clear, 1256 is the 2013  
18 voter ID law?

19 A Yes, sir.

20 Q And SB1 is the 2012 law?

21 A Yes, sir.

22 Q And so this does not indicate how a voter can get a  
23 free ID, does it?

24 A Correct.

25 Q You were asked on direct about some outreach you've

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1 conducted. Do you recall that?

2 A Yes.

3 Q And you said you spoke to the Hanover NAACP, is that  
4 right?

5 A Yes, at some point.

6 Q Now, they asked you to come out to speak to them,  
7 right?

8 A Yes. Well, they -- if I can correct?

9 Q Please.

10 A They stated that they were going to -- the registrar  
11 stated that she was going to be meeting with the NAACP,  
12 and we volunteered to come help. So she wasn't requesting  
13 our presence, specifically.

14 Q Do you remember being asked about that topic in your  
15 deposition?

16 A Yes.

17 Q Go ahead.

18 A That's just it.

19 Q Do you remember what you said about that?

20 A No, I don't remember, specifically.

21 MR. KAUL: Could we pull up Page 41, Line 22.

22 THE COURT: Of what?

23 BY MR. KAUL:

24 Q This is your deposition transcript, is that right?

25 THE COURT: Where is that going to be found in the

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1 record? Does it have an exhibit number?

2 MR. KAUL: We were going to do the admission  
3 separately. I was just using this to refresh -- to  
4 impeach.

5 THE COURT: Okay. You're going to use it for  
6 refreshment. All right. You can use it for past  
7 recollection revived.

8 MR. KAUL: Thank you, Your Honor.

9 THE COURT: Mr. McClees, read over the document and  
10 see whether or not that refreshes your recollection.

11 MR. MCCLEES: Yes, it does.

12 THE COURT: It does?

13 MR. MCCLEES: Yes, Your Honor.

14 THE COURT: He's prepared to respond. Go ahead.

15 A Yes, I'm looking at the deposition. Do you have a  
16 question on that, sir?

17 Q And the NAACP had asked you to come speak, right?

18 A Well, in this period I said they ask me to come  
19 speak. But it was actually the NAACP asked the general  
20 registrar to come and speak, and the registrar contacted  
21 us, and then I went and spoke and the NAACP introduced me.  
22 So, yes.

23 Q I see. And so was the Department of Elections doing  
24 affirmative outreach to minorities groups?

25 A I wasn't the person in charge of voter outreach, but

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1 we hired a person to specifically do an outreach, and I  
2 think that they were contacting organizations.

3 Q But you weren't involved in that?

4 A Well, when we went to Virginia Organizing in  
5 Charlottesville, that was specifically at the behest of  
6 the person who was in charge of that who wished to bring  
7 me along.

8 Q And you mentioned discussions at some churches, or  
9 outreach at some churches?

10 A It was just a letter. I never went to the churches.

11 Q So you didn't go to churches?

12 A No.

13 Q Okay. Do you recall talking a little while ago about  
14 Megan Cotten?

15 A Yes. Yes.

16 Q And how did her situation come to your attention?

17 A It was through an e-mail. And if I remember  
18 correctly with the e-mail chain, she had contacted the  
19 Secretary of the Commonwealth, the Secretary of the  
20 Commonwealth had contacted Edgardo Cortes, and then I  
21 believe Edgardo Cortes --

22 THE COURT: You need to speak a little more slowly so  
23 she can take it down.

24 MR. MCCLEES: My apologies, madam.

25 It's just I always speak too quickly.

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1 A It was Secretary -- she had contacted the Secretary  
2 of the Commonwealth, is my understanding. The Secretary  
3 of Commonwealth contacted our agency, and then our agency,  
4 Edgardo Cortes, contacted me and asked me to reach out to  
5 her.

6 MR. KAUL: And I'm going to ask for Plaintiffs'  
7 Exhibit 94 to be brought up.

8 BY MR. KAUL:

9 Q That's up on the screen there. And I can get you a  
10 hard copy, too. Would that be helpful?

11 A The electronic would be perfectly fine, sir.

12 Q Okay. And this is a document that goes through three  
13 pages.

14 MR. KAUL: If we can just click through those quickly  
15 so he can see them all. All right. And then go back to  
16 the first page.

17 BY MR. KAUL:

18 Q So is this the e-mail string that you were involved  
19 in regarding Ms. Cotten?

20 A Yes, sir, it is.

21 MR. KAUL: And, Your Honor, we will move that this be  
22 admitted as Plaintiffs' Exhibit 94.

23 THE COURT: Any objection?

24 MS. HART: No, Your Honor.

25 THE COURT: Received.

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1 (Plaintiffs' Exhibit 94 is received.)

2 BY MR. KAUL:

3 Q Now, this circumstance came to your attention because  
4 she had first reached out to Mr. Stoney?

5 A Yes.

6 Q When voters have issues with provisional ballots  
7 generally, are the poll workers instructed to raise those  
8 issues to your attention, or was this an unusual  
9 situation?

10 A Poll workers aren't asked to bring -- well, it  
11 depends on what your definition of poll worker is. We use  
12 very precise terms in Virginia.

13 Q I think you said election officer.

14 A Officers of Election. So, Officers of Election are  
15 going to -- first of all, if it comes to a regular Officer  
16 of Election, they're going to consult their chief Officer  
17 of Election. And if their chief Officer of Election can't  
18 handle that situation, they would contact their general  
19 registrar, and then their general registrar might contact  
20 me on election day.

21 When it comes to voters, voters often are going to  
22 immediately contact the -- at that time, the Department of  
23 Elections, and then from there it goes through the phone  
24 call tree that I was talking about before, and then it  
25 could reach me.

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1 Q Let me ask you about another document. I'm doing to  
2 direct your attention back in time to the 2012 voter ID  
3 law that was in place.

4 A Sure.

5 MR. KAUL: Let's look at PX 68.

6 THE COURT: Is that your exhibit or a defense  
7 exhibit?

8 MR. KAUL: Plaintiffs. Your Honor, and I keep saying  
9 PX. I apologize. I'll be clearer.

10 And let's show the second page so he can see the full  
11 document.

12 BY MR. KAUL:

13 Q Now, do you recognize this?

14 A Yes, I do.

15 Q And this is an e-mail exchange that you were involved  
16 in. And the last e-mail was sent by you, right?

17 A Yes.

18 Q Who is Susan Lee?

19 A Susan Lee is my direct manager.

20 Q And how would you pronounce that first word in your  
21 e-mail?

22 A "Wooooooooowwww."

23 Q So you were excited, it's fair to say?

24 A Certainly. Certainly.

25 Q So the implementation of the 2012 ID law went well,

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1 is that right?

2 A Compared with disastrous scenarios we've been  
3 presented before that, certainly.

4 Q And then a few months later, the legislature changed  
5 the law, right?

6 A That's correct.

7 Q You were mentioning before some issues that were  
8 brought to your attention on election day in 2014 and  
9 2015?

10 A Yes.

11 MR. KAUL: Let's bring up Plaintiffs' Exhibit 96.

12 Actually, before we discuss this, Your Honor, I'd  
13 move that 68, Plaintiffs' 68, be admitted. That was the  
14 one we just discussed.

15 THE COURT: If you feel it has value, I'll admit it.

16 MR. KAUL: I do, Your Honor.

17 THE COURT: Okay.

18 MR. KAUL: And I'll have Ms. Schultz just briefly  
19 walk you through 96 here. Can we just flip to the next  
20 couple pages. Thank you.

21 BY MR. KAUL:

22 Q And do you recognize that one as well?

23 A I remember from the depositions. So, yes.

24 Q Okay. And going back to the first page, this is an  
25 e-mail that you sent, right?

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1 A Yes.

2 Q And this relates to one of the complaints that you  
3 received on election day in 2014, right?

4 A Yes. Well, yes, it was received by Chesterfield, if  
5 I'm not mistaken. And then I responded about it, yes.

6 MR. KAUL: Let's go to Page 2 of that document.

7 BY MR. KAUL:

8 Q The complaint you received was that -- related to  
9 whether voters could use electronic forms of ID to vote,  
10 right?

11 A Correct.

12 Q And what's the rule in Virginia?

13 A The rule in Virginia is that you need to provide a  
14 form of an identification document.

15 Q A hard copy?

16 A Correct.

17 Q So if you have something electronically, you could  
18 print it out, and you walk in with that, can you use that?

19 A Not initially, no.

20 Q What do you mean by that?

21 A I mean, the -- that wouldn't entitle you to a regular  
22 ballot at that point in time because it's not the original  
23 document. You need to provide the original document when  
24 you're entitled to a regular ballot.

25 MR. KAUL: And, Your Honor, we move that 96 be

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1 admitted.

2 THE COURT: Now, you identified this as a document  
3 you saw at the deposition. Do you have any other  
4 recollection of it?

5 MR. MCCLEES: No. I just remember it from the  
6 deposition.

7 MR. KAUL: May I ask a follow-up, Your Honor?

8 THE COURT: Yes. Go ahead. If you think it's of  
9 value, go right ahead.

10 MR. KAUL: Just briefly.

11 BY MR. KAUL:

12 Q The top of the first page. This is an e-mail that  
13 you sent, right?

14 A It certainly looks that way.

15 Q You don't have any doubt about that?

16 A I have no doubt.

17 MR. KAUL: Your Honor, we would move this one in.

18 THE COURT: All right, sir.

19 (Plaintiffs Exhibit 96 is received.)

20 BY MR. KAUL:

21 Q All right. I'd just briefly like to ask you about a  
22 couple of the What-If guides you discussed before.

23 A Sure.

24 MR. KAUL: And let's bring up Plaintiffs' Exhibit 61.

25 BY MR. KAUL:

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1 Q You talked before about the most recent What-If  
2 guide?

3 A Yes.

4 Q All right. And does this appear to be the first of  
5 several pages of the 2010 What-If guide?

6 A Judging from the revision date, yes.

7 MR. KAUL: I'm not sure if there's an objection to  
8 this one or not?

9 MS. HART: No objection, Your Honor.

10 THE COURT: Be received.

11 MR. KAUL: Thank you, Your Honor.

12 (Plaintiffs' Exhibit 61 is received.)

13 BY MR. KAUL:

14 Q Now, you used that as a base for future What-IF  
15 guides that you prepared, right?

16 A Correct. I joined the agency in 2011, so the What-If  
17 guide certainly preceded me. So when I joined the agency  
18 and I was starting to update this, I certainly would have  
19 used versions that were previously available.

20 Q Let me next show you Plaintiffs' Exhibit 57. And  
21 this is a What-If guide from 2012, is that right?

22 A Yes, sir. It looks that way.

23 MR. KAUL: Unless there's any objection, I'll move in  
24 Plaintiffs' Exhibit 57.

25 THE COURT: Any objection, Ms. Hart?

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1 MS. HART: No objection.

2 THE COURT: Be received.

3 (Plaintiffs' Exhibit 57 is received.)

4 BY MR. KAUL:

5 Q And the point I'm getting to with these, and I'm not  
6 going through each of these guides in detail, but as  
7 additional laws have been passed, these What-If guides  
8 have become increasingly complex, right?

9 A Well, I don't know if I can state "*complex*" because  
10 sometimes we take information out, and so that would -- in  
11 some situations it simplifies it. I will say that I don't  
12 know if I can agree with the word "*complex*," sir.

13 Q Okay. As more voter ID laws have been passed, you've  
14 added information about --

15 A I would it state it's become more comprehensive. But  
16 as far as being more complex, I don't believe it asks them  
17 to do things that are -- there are some things in the  
18 election's world that are complex. I don't believe this  
19 fits into being complex with this. Just my personal  
20 opinion.

21 Q Okay. So when you say "*comprehensive*," you mean  
22 there's more information there?

23 A Sure. Certainly.

24 Q You were asked about the debate regarding voter ID  
25 legislation?

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1 A Yes, sir.

2 Q And I think you mentioned that one supporter had  
3 mentioned some case of fraud?

4 A That would be Senator Garrett. I remember him  
5 talking specifically, you know --

6 THE COURT: Senator Gary or Senator Garrett?

7 MR. MCCLEES: Garrett. My apologies, Your Honor.

8 BY MR. KAUL:

9 Q And the case he discussed was not a case of voter  
10 impersonation fraud, was it?

11 A I have no clue. I was just listening in the crowd,  
12 and he stated that he had prosecuted cases of voter fraud.  
13 That stood out in my mind because that was the first time  
14 I'd heard of somebody saying that they had prosecuted  
15 cases of voter fraud like that.

16 Q Do you remember if he was talking about vote buying?

17 A I haven't the slightest of what he was referring to.

18 THE COURT: Is your office involved in criminal  
19 investigations of voter violations?

20 MR. MCCLEES: No, sir, we are not. We are not an  
21 investigatory agency.

22 THE COURT: Okay.

23 BY MR. KAUL:

24 Q Now, there were a number of groups that spoke out in  
25 opposition to the voter ID bill, correct?

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1 A Yes.

2 Q And that includes the League of Women Voters?

3 A Yes, sir.

4 Q And former State Board of Elections Secretary, Mike  
5 Brown?

6 A Yes. Yes. I don't remember him specifically from  
7 the Senate meetings, but I remember him making his case  
8 known at the NAACP meetings, certainly.

9 Q And the NAACP also opposed that law?

10 A That is correct, sir. Yes.

11 Q And that was in the hearings?

12 A Yes. I remember them coming to the hearings. Yes,  
13 sir.

14 Q And what were the concerns that those groups were  
15 raising?

16 A They were raising concerns about persons that didn't  
17 have ID. They were raising concerns that there was no  
18 provable instances of voter impersonation fraud. They  
19 were raising concerns about students. They were raising  
20 concerns about people being able to traverse to get the  
21 IDs. They were raising multiple concerns.

22 Q And the supporters said -- responding to those  
23 concerns by saying what?

24 A They were stating that, you know, why not make the  
25 process harder. They were also stating that because we

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1 didn't have the mechanism to detect whether fraud was  
2 taking place or not, we didn't know if fraud was taking  
3 place.

4 Q And did they claim that everybody had an ID?

5 A I think they would intimate that. I don't know if  
6 they specifically said those words. But they were  
7 certainly stating that, you know, I have an ID, all these  
8 other people have driver's licenses, and things.

9 Q And you said the debate was highly partisan, is that  
10 right?

11 A Sure. Sure.

12 Q And you said the Democrats were opposed and the  
13 Republicans supported it?

14 A I thought it was quite plain.

15 Q I want to ask you about the adoption of the rule  
16 regarding expiration dates.

17 A Okay.

18 Q And I sort of want to walk you through the timeline  
19 and make sure we've got the details right. So when this  
20 bill passed, "*this bill*" meaning the 2013 voter ID law,  
21 the staff at the State Board of Elections had  
22 communication with the board members about their view as  
23 to what the expiration date rules should be, right?

24 A No, sir. Well, when you say "*should be*," or are you  
25 stating as what our current guidance was, or what we

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1 personally believed it should be, or professionally  
2 believed it should be? Because I don't inform the  
3 Board -- I didn't inform the Board on, you know, what my  
4 opinion was on what it should be. I work at the will of  
5 the Board.

6 So I would state what I believe the current standard  
7 was, what our current standard was, our lack of statutory  
8 basing on that. I would inform the Board of that. But I  
9 did not give a recommendation on what it should be.

10 Q Let me ask, did you inform the Board members of what  
11 your practice had been prior to the law?

12 A Yes, sir.

13 Q And what was that?

14 A It accepted unexpired IDs, or expired within the  
15 previous 30 days.

16 Q Okay. And so that was the practice before the 2013  
17 bill was passed?

18 A Yes, sir.

19 Q And Board Member Bowers and Mr. Judd agreed that that  
20 time frame should be expanded, right?

21 A That is correct.

22 Q And based on their guidance, you proposed draft  
23 language that would have permitted all expired IDs to be  
24 used for voting?

25 A That is correct.

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1 Q All right.

2 MR. KAUL: And let me bring up Plaintiffs'

3 Exhibit 140. And then let's take a look at the second  
4 page.

5 BY MR. KAUL:

6 Q Do you recognize this document?

7 A Yes, I do. This is a draft of 20-40-10, sir.

8 Q Okay. And this talks about valid meaning voter ID  
9 that means documents that appear to be genuinely issued by  
10 the agency, or the agency are issuing entity. Do you see  
11 that?

12 A Yes.

13 Q And so this draft language that was prepared has no  
14 reference to an expiration date, right?

15 A Correct.

16 Q And subsequent to this, there was language added that  
17 specifically spelled out that an expiration date was not  
18 relevant, right?

19 A Yes, sir.

20 Q Okay. And the Board adopted a policy that said that  
21 expiration dates were not relevant, right?

22 A That's correct, sir.

23 Q Now, that changed, right?

24 A Yes, sir.

25 Q And it's your understanding specifically that people

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1 who worked with Senator Obenshain approached Chairman Judd  
2 because they were unhappy about the regulation, right?

3 A I don't know who contacted who. I was not privy to  
4 that specific information. I was just made know that  
5 Chairman Judd switched his opinion. I didn't know exactly  
6 how he was contacted, or anything. But it was definitely  
7 something that I was alerted to when I came back from  
8 Brazil.

9 MR. KAUL: And I want to come back to that in a  
10 minute.

11 Your Honor, I move that Plaintiff's Exhibit 140 be  
12 admitted. That's the document that shows the draft  
13 regulation.

14 THE COURT: I have no objection. It's an uncontested  
15 point. I mean, it's not even an issue here. But if you  
16 want it in evidence, I will put it in there. I mean, my  
17 goodness.

18 I assume there's no objection?

19 MS. HART: No objection, Your Honor.

20 THE COURT: Okay.

21 Very marginally relevant.

22 (Plaintiffs' Exhibit 140 is received.)

23 BY MR. KAUL:

24 Q All right. So do you recall being asked in your  
25 deposition about why the regulation changed?

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1 A Yes.

2 Q Okay. And do you recall saying that you learned that  
3 Chairman Judd has been approached by Obenshain's people?

4 A I might have said that. Sure. Certainly.

5 Q Well, let's see if you look at your deposition if it  
6 refreshes your recollection.

7 A Sure.

8 MR. KAUL: Can we pull up Mr. McClees' deposition  
9 transcript. And it's Page 119.

10 BY MR. KAUL:

11 Q And let me ask you to read through Lines 4 to 24, and  
12 see if that refreshes your recollection.

13 A Okay. Thank you.

14 Okay. Yes. Yes.

15 Q And so it is your understanding that Senator  
16 Obenshain's -- I guess his staff approached Chairman Judd?

17 A Yes.

18 Q Is that right?

19 A Yes.

20 Q And Senator Obenshain then sent a letter to the Board  
21 as well indicating that he was criticizing the regulation,  
22 is that right?

23 A I don't know, specifically. If you give me a -- I'll  
24 be more than happy to -- if you can refresh my memory,  
25 I'll be more than happy to look at that.

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1 Q That's okay. After at least that meeting, or that  
2 meeting that we were just discussing, the Board did in  
3 fact issue a new proposed regulation, right?

4 A That is correct. Yes.

5 Q All right. And this one, rather than allowing all  
6 expired licenses, the proposed regulation would only allow  
7 licenses that had been expired for 30 days, is that right?

8 A I don't remember the specific date. If you have an  
9 exhibit, I would love to have my memory refreshed on that.  
10 I remember that it was something that was less than a  
11 year, and certainly was -- it was between a year and  
12 infinity.

13 Q Okay. And that was after the Board had originally  
14 made clear that an expiration date was irrelevant?

15 A Yes. That's correct. Yes.

16 Q Now, you were talking about the number of comments  
17 you received on this new proposed regulation?

18 A Absolutely. Yes.

19 Q And it was something like 600, right?

20 A I remember it was around 500. It might have been up  
21 to 600. But I know it was a heck of a lot more than I was  
22 used to. Yes, sir.

23 Q And let me show you --

24 MR. KAUL: Can we bring up on the screen Plaintiffs'  
25 Exhibit 152. And I'm just going to ask Ms. Schultz to

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1 sort of scroll through this very briefly.

2 BY MR. KAUL:

3 Q But does this appear to you to be the set of comments  
4 that you received?

5 A Yes, sir, it does.

6 MR. KAUL: And, Your Honor, this is Plaintiffs'  
7 Exhibit 152, which I would move into evidence.

8 THE COURT: Any objection?

9 MS. HART: Your Honor, I think there's some clear  
10 hearsay issues with it.

11 THE COURT: Well, I don't think it's offered for  
12 anything other than the fact that he received this. The  
13 truth of the matter is really not at issue. The question  
14 here is whether or not he received that language via that  
15 particular document.

16 The objection is overruled. It will be admitted.

17 (Plaintiffs' Exhibit 152 is received.)

18 BY MR. KAUL:

19 Q Did the significant majority of the comments you  
20 received oppose reducing the period of expiration?

21 A Absolutely. Absolutely.

22 Q Have you ever received nearly so many comments on a  
23 regulation?

24 A Not at this time. Certainly, not.

25 Q What would you typically do when you get comments on

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1 a regulation to prepare the Board for its meeting?

2 A Normally, not only would I do this sort of table with  
3 the raw input -- normally, I would go through each and  
4 every single comment and pull out every issue lodged, and  
5 then create a table of how many instances of that argument  
6 were made.

7 Q Did you do that here?

8 A No, I did not.

9 Q Why not?

10 A Because the turnaround time between the closing of  
11 the comment period and the hearing of the Board was so  
12 close that I didn't have time to sift through these and do  
13 that sort of issue spotting.

14 Q And was this an unusually fast process?

15 A I would say so, yes.

16 Q And why was -- do you know why the Board was trying  
17 to move quickly with this?

18 A I haven't the slightest.

19 Q Let me ask you about another document, Plaintiffs'  
20 Exhibit 145. And let's start on -- well, you see at the  
21 bottom of the first page there's an e-mail from you to  
22 Susan Lee and Mr. Cortes?

23 A Yes. I see.

24 MR. KAUL: Okay. Let's turn to the second page.

25 BY MR. KAUL:

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1 Q And this is the body of that e-mail, is that right?

2 A I believe so. Yes, sir.

3 Q I mean, you raise some questions for your colleagues  
4 in this e-mail?

5 A Yes. Yes.

6 Q All right. And the first one was what to do with  
7 people who had a religious objection to having their  
8 photograph taken?

9 A Yes.

10 Q Is there an exception to the voter ID law that allows  
11 -- that deals with the circumstances for people to have  
12 religious objections to being photographed?

13 A Not within 24.2-643(b). No.

14 Q So can people who have a religious objection to being  
15 photographed vote in person in Virginia?

16 A Not that I'm aware of.

17 Q The only option they have available is to vote  
18 absentee?

19 A Yes. That's my understanding.

20 Q You also raised an issue about what happens if a  
21 person's name changes from what's on their ID?

22 A Can I say something on the original -- your previous  
23 question?

24 Q Sure.

25 A There is a photo ID chart that states that Tribal

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1 enrollment IDs are acceptable. And I don't know what  
2 those have on them. So theoretically, if one of the  
3 acceptable Tribes doesn't have a photo ID, it might be  
4 able to be shoehorned in. But I've never come across that  
5 situation or know the statutory backing based on it. It  
6 was just something that preexisted.

7 Q Okay. Just to be clear, the law that passed in 2013  
8 requires all IDs that are used to vote to have a  
9 photograph on them, right?

10 A What it does is it gives you a list of acceptable  
11 forms of identification. And all those acceptable forms  
12 of identification have a photo upon them. But it is my  
13 understanding that it doesn't state that only -- it  
14 doesn't state photo IDs -- it is my understanding that it  
15 states -- it gives a list of IDs, and all the IDs that it  
16 lists contain photographs upon them. So it's a little bit  
17 different.

18 Q Okay. And the statute will speak for itself on that  
19 point?

20 A Absolutely.

21 Q So other than that circumstance with the possibility  
22 of Tribal IDs, a voter with a religious exception can't  
23 vote in-person?

24 A Yes, sir.

25 Q All right. Now, the second issue you raised in this

## CROSS-EXAMINATION OF MYRON MCCLEES

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1 e-mail was what happens with a person who has changed  
2 their name?

3 A Yes.

4 Q So, for example, if a couple gets married and they  
5 have the same last name following the marriage, but the ID  
6 has the old last name, this is the type of circumstance  
7 you're talking about?

8 A Yes, I believe so. Yes.

9 Q So did you resolve this issue? What happens?

10 A I believe that Cameron created a document based on  
11 this. And I don't know if it ever got final approval and  
12 went out. But I know that Cameron was certainly concerned  
13 with this sort of situation.

14 Q So what happens now if a voter shows up at a poll  
15 with -- you know, say, a couple gets married and the woman  
16 changes her name and she's got her old last name on the  
17 license, but the voter roll has her married name, what  
18 happens?

19 A Sure. The standard -- the underlying standard has  
20 changed as of July 1, 2015. Delegate, I want to say,  
21 Watts, introduced a bill saying that if the name is  
22 substantially similar to the name within the poll book,  
23 that it can be accepted. So now that "*substantially*  
24 *similar*" is the standard, what that means to a person  
25 actually checking the polls, you know, an Officer of

McClees - cross

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1 Election in a polling place, I don't know. But it is the  
2 standard now.

3 Q But so if my name were Kaul and I got married and it  
4 became McClees, that's not substantially similar, right?

5 A Not in my opinion. But once again, it's left in the  
6 hands of an Officer of Election.

7 Q Okay. So those people who changed their name, but  
8 have the old name on their ID, they can't vote under that  
9 old name unless it's substantially similar?

10 A Unless it's substantially similar in the eyes of an  
11 Officer of Election.

12 THE COURT: Substantially similar to the name on the  
13 voting roll, right?

14 MR. MCCLEES: Yes, Your Honor.

15 THE COURT: Okay.

16 I think before you get into another topic, we're  
17 going to take a 10-minute recess, okay?

18 MR. KAUL: Thank you, Your Honor.

19 (Recess taken.)

20 (Gil Halasz is now the court reporter.)

21 CROSS EXAMINATION (continued)

22 THE COURT: All right, you may continue.

23 BY MR. KAUL:

24 Q Could we bring that document back up that I was just  
25 talking to Mr. McClees about?

McClees - cross

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1 I want to qualify a couple points on this. We were  
2 talking about the religious objection and how somebody,  
3 with the exception you noted could only vote absentee,  
4 right?

5 A Yes.

6 Q But a voter has to have an excuse to vote absentee in  
7 Virginia, right?

8 A That's correct.

9 Q There is no religious objection excuse?

10 A Yes, there is. Yes, sir, there is.

11 Q Can you tell me about that?

12 A I believe it is in -- I am not the absentee person  
13 but I believe in 24.2-701, sir.

14 Q 24.2-701?

15 A 701.

16 THE COURT: Code of Virginia.

17 THE WITNESS: Yes, I believe in there. It is -- I  
18 know it is within chapter 7 of title 24.2. And it  
19 gives -- obligation occasioned by my religion. So it is  
20 within there. So we have interpreted that to allow even  
21 atheists who don't wish to venture into a church for a  
22 polling place to assert an excuse for voting absentee.

23 BY MR. KAUL:

24 Q Okay.

25 There is language that says that a voter can vote

1 absentee because of an obligation due to their religion?

2 A Right.

3 Q And you have interpreted that in that religious  
4 objectors to being photographed can vote absentee?

5 A Right.

6 Q Okay.

7 So, but that is, other than the tribal exception, the  
8 only way to vote?

9 A Yes, sir.

10 Q And do voters have to mark the reason they are being  
11 excused, their excuse for voting absentee?

12 A Yes. Yes, they do, sir.

13 Q Do you inform voters about that option to mark that  
14 box to vote absentee?

15 A What do you mean by "inform voters," sir?

16 Q Do you do out reach to tell religious objectors they  
17 can vote absentee that way?

18 A Oh, no. No. My apology. I am not the person who  
19 handles absentees, so I am not aware of any out reach.

20 Q Okay.

21 You have received questions about religious  
22 objectors, right. E-mail?

23 A In a hypothetical sense. I have yet to receive  
24 anything specifically that I can remember from a person  
25 who actually said, I object to being photographed. So it

1 always comes from groups who are asking questions, well,  
2 what if? But I don't remember specifically somebody  
3 saying, hey, I am not going to take a photograph, or I'm  
4 not able to take a photograph. I don't remember that sort  
5 of thing happening.

6 Q Any of these groups that advocate on behalf of  
7 voters, right?

8 A Absolutely, yes.

9 Q And so could we go back to the first page of this  
10 e-mail?

11 Let's zoom in on your e-mail to Mr. Edgardo Cortez.  
12 Do you see here you say, "You are free at any time to meet  
13 on both this and the Obenshain letter?"

14 A Yes.

15 Q Does that refresh your memory from before about  
16 whether Senator Obenshain's letter regarding the  
17 definition of what a valid ID is?

18 A No. Because, if that -- is this before the World  
19 Cup? Looking at the date, this is June 16, so this is  
20 before I left. I don't remember specifically addressing,  
21 speaking about a letter from Senator Obenshain before I  
22 left. Because I remember when I came back I was caught a  
23 little bit unaware. At least that is what I think I  
24 remember coming back and being kind of surprised a little  
25 bit. Not too much, but surprised a little bit.

1 Q To be clear, you did send this e-mail?

2 A Sure, yes.

3 Q Your Honor, we move this be admitted as plaintiffs'  
4 exhibit 145.

5 THE COURT: Any objection?

6 MS HART: No objection, Your Honor.

7 THE COURT: It will be received.

8 (Plaintiffs' Exhibit 145 was  
9 offered and received in evidence)

10 BY MR. KAUL:

11 Q You were also talking about the volume of comments  
12 you received on your regulation?

13 A Yes, sir.

14 Q Was there also an unusual volume of people speaking  
15 at the legislature, members of the public speaking about  
16 the voter ID law?

17 A For, I would say for the Privileges and Elections  
18 Committee it ranked up there certainly.

19 Q You said the line went out the door, right?

20 A It was all the way down the aisle. Certainly all the  
21 way down the aisle in the chamber. I want to say Senate  
22 chamber A. It was a long line of people, certainly.

23 Q Most of those people were expressing their opposition  
24 to the voter ID bill, right?

25 A I would say that is what my recollection was.

1 Q You said that is what your recollection --

2 A That is what my recollection is, yes, sir.

3 Q We were talking before about the change to the  
4 definition of "valid." And we discussed expiration date  
5 and the 30-day limit. Ultimately the board adopted a rule  
6 that allowed for identifications to be expired for up to  
7 one year if they were going to be used for voting; is that  
8 right?

9 A Yes, sir.

10 Q That is not the recommendation that the staff of your  
11 agency had provided, right?

12 A Well, it is, again, when it comes to recommendation,  
13 if I did not specifically recommend something based on my  
14 analysis, I work at the will of the board, so my input to  
15 the board was, here is what we have been operating under.  
16 Then it was, we are going to go no expiration. And then  
17 after that, I made no recommendation on a specific time  
18 period. So, it is not like I used my professional  
19 analysis to provide something. I was just working at the  
20 will of the board.

21 Q Were you present at the meeting when the board passed  
22 that the final regulation, the one that --

23 A Yes, I was at that one, yes.

24 Q And Kimberly Bowers, who is one of the three board  
25 members, was not present, right?

1 A That's correct.

2 Q And she is the Democratic appointee to the board, is  
3 that correct?

4 A Yes. She was vice chair.

5 Q Is it unusual for the board to have meetings with  
6 members absent?

7 A With that board I don't remember meetings with -- I  
8 don't remember a lot of meetings without other members.  
9 And I think the current board, they have had situations  
10 where they have met without a member present. But I don't  
11 remember multiple meetings with members not present then.

12 Q Is the only one you remember with the board involving  
13 Chairman Judd, Ms. Bowers, Mr. Palmer, in which a board  
14 member was missing, the one when the definition of "valid"  
15 changed; is that right?

16 A It is the one that stands out, I would say, but I  
17 can't guarantee that there weren't others. It is one that  
18 I certainly remember. It is one that I remember, but I  
19 cannot speak assuredly that there weren't others, but it  
20 certainly stands out.

21 Q I want to ask you a couple quick questions about the  
22 implementation of the voter ID rules.

23 A Yes, sir.

24 Q A voter -- an employer ID to be used for voting has  
25 to be issued in the ordinary course of business, right?

1 A Yes.

2 Q You are smiling. Why is that?

3 A Because we get multiple questions from people on this  
4 situation. For instance, realtor business card. And, you  
5 name it, we get all kinds of questions from people.  
6 Normally it is from registrars who like to pepper me with  
7 hypotheticals. But, yes, we even have people say, if a  
8 person runs their own company and, you know, they are  
9 self-employed and they issue themselves an ID. So, I  
10 mean, I get all kinds of questions on it. It is a sticky  
11 wicket.

12 Q What guidance do you give on that sticky wicket?

13 A I say in the ordinary course of business where it is  
14 normal to provide an ID, and it isn't just being produced  
15 solely for this sort of situation, and it is not -- and  
16 the purpose is to identify that person to an employer as  
17 opposed to for public purposes. Whereas, you know, a  
18 realtor business card is for me, if I were a realtor for  
19 me to introduce myself to a general person, a client, or  
20 something. Not for me to introduce or to prove my  
21 identity to my employer.

22 Q So I can't use my realtor business card?

23 A I have never given official guidance on this, but it  
24 would be something that I would lean towards not,  
25 probably.

1 Q And the registrar is sort of told to do whatever they  
2 think is right, or how does that work?

3 A We -- normally what we will do is, if they ask for  
4 official guidance, we will provide official guidance. If  
5 they ask for -- if they call me up and ask for my general  
6 opinion on that one, I would probably punt, and say, it is  
7 one I probably wouldn't normally think would fit, but I  
8 leave it in your discretion. That is the sort of  
9 situation.

10 Q Is it possible if I live in Fairfax County I can use  
11 my realtor ID to vote, but if live in Arlington I can't?

12 A Without official guidance specifically issued by our  
13 agency, yes, it would be a little bit of gray area, sure.

14 Q Now, out-of-state driver's licenses issued by state  
15 governments. I can't use those, right?

16 A That's correct.

17 Q And a license issued by the DMV in Virginia, if it  
18 has been expired a year and a day, I can't use that,  
19 correct?

20 A Correct.

21 Q How does the reasonable resemblance part of the ID  
22 process work?

23 A It is left in the discretion of the officers of  
24 election in the polling place. So, I think all of --  
25 well, not all -- but the great majority of the standards

1 within our Title 24.2 are based on a community standard  
2 where your neighbors are the ones who are vetting you,  
3 quote unquote, vetting you. So it is kind of based on  
4 that notion, idea, that your neighbor is the one who is  
5 checking you out.

6 So, in that situation when you go up, if you present  
7 ID they don't think you resemble, they give you the  
8 opportunity to direct you towards the provisional voting.

9 Q Why do you have that community standard you have been  
10 describing?

11 A It has just been a part of the code for, you know,  
12 certainly preceded me. But it is something that is a very  
13 integral part of our process.

14 Q Is it the idea your neighbors are more likely to know  
15 who you are than --

16 A I think so. The reason why the school year lets out  
17 in summer, so you can go harvest.

18 THE COURT: Let's move on here.

19 BY MR. KAUL:

20 Q I want to get to your neighbors are more likely to  
21 know you than the general registrar, right?

22 A Theoretically, yes, sir.

23 Q So if I show up to the polls and the poll worker says  
24 I don't reasonably resemble my ID, I can still cast a  
25 provisional ballot, right?

McClees - cross

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1 A Correct. Or if you have another ID that you  
2 resemble, you can present that.

3 Q If I cast a provisional ballot I can cure that by  
4 faxing an ID or e-mailing an ID, right?

5 A Yes, sir.

6 Q I could even use the same ID I wasn't allowed to vote  
7 with to cure the ballot?

8 A Yes, sir, you could.

9 Q There is no way for the election worker to check when  
10 I fax that if I resemble the person?

11 A No, sir, there isn't.

12 Q Instead I could vote absentee if I had an excuse  
13 without any ID at all, correct?

14 A That's correct.

15 So long as there is HAVA involved there, but assuming  
16 you have met those HAVA standards, yes.

17 Q No further questions.

18 THE COURT: Any redirect?

19 MS HART: Yes, sir.

20 THE COURT: All right.

21 REDIRECT EXAMINATION

22 BY MS HART:

23 Q A couple more questions for you, Mr. McClees.

24 The first one has to do with fraud. Fraud isn't  
25 something that you normally handle. Is it voter fraud

1 specifically?

2 A No, it is not.

3 Q So if there were voter fraud issues that is not  
4 something would come to your desk, typically?

5 A Not specifically. Sometimes people will ask us  
6 questions about fraud. Or will try to ask us, give us a  
7 scenario. We always refer those to the Commonwealth's  
8 attorney.

9 Q Why is that?

10 A Because we are not an investigatory agency. We don't  
11 have the mechanism in order to go out and check that sort  
12 of thing.

13 Q And the Commonwealth's attorney does?

14 A Absolutely.

15 Q All right.

16 The next question has to do with provisional voter  
17 notice. The 2015 version of the provisional voter notice  
18 does advise the provisional voter about the free voter ID  
19 option, correct?

20 A That is correct.

21 Q Do you have any reason to think that future versions  
22 of that provisional notice would not contain that notice?

23 A Heavens, no.

24 Q When the 2013 law, SB 1256, was passed it included  
25 additional forms of acceptable photo ID; is that right?

Davis - direct

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1 A I believe so, yes.

2 Q And when you updated the What If guide, you included  
3 those additional forms of photo IDs, right?

4 A Correct. After passage stage of 1256, yes.

5 Q I have no further questions.

6 THE COURT: Okay. May this gentleman be excused?

7 You are excused and free to go. Thank you for coming. We  
8 appreciate your testimony.

9 THE WITNESS: Thank you.

10 (Witness stood aside)

11 THE COURT: Who will be your next witness?

12 MR. FINBERG: Defense calls Matthew Davis.

13 THE COURT: Mr. Davis. All right.

14 Mr. Davis, if you would raise your right hand, left  
15 hand on the Bible, and face the Clerk of the Court.

16 MATTHEW JAMES DAVIS

17 WAS SWORN AND TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 MR. FINBERG: Could I ask the Court Security Officer  
20 to give one copy of this binder to Mr. Davis?

21 THE COURT: Yes, sir.

22 MR. FINBERG: Then a copy for the law clerk and for  
23 Your Honor.

24 THE COURT: All right.

25 MR. FINBERG: May I proceed?

Davis - direct

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1 THE COURT: Yes, sir, you may.

2 BY MR. FINBERG:

3 Q Thank you.

4 Good morning, Mr. Davis.

5 A Good morning.

6 Q Could you please state your full name for the record,  
7 spelling the last name.

8 A Matthew James Davis. D-A-V-I-S.

9 Q Thank you.

10 Mr. Davis, can you briefly describe your educational  
11 background since high school.

12 A Bachelor's in government, minor in astronomy, masters  
13 in teaching from the University of Virginia.

14 Q Okay.

15 When did you obtain those different degrees?

16 A I graduated in the spring of 2000.

17 Q Where do you currently work?

18 A Department of Elections.

19 Q What is your job title at the Department of  
20 Elections?

21 A Chief Information Officer.

22 Q Could you describe for the Court what your job duties  
23 are as the Chief Information Officer at the Board of  
24 Elections?

25 A I am essentially the information technology manager

Davis - direct

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1 for the department. I manage the statewide voter  
2 registration system, which is also election management  
3 system for the Commonwealth. As well as the campaign  
4 finance disclosure application, and all of the IT needs  
5 for the agency.

6 Q How long have you been in that position?

7 A Just over six years.

8 Q Mr. Davis, I am going to ask you some questions about  
9 list maintenance guidelines. Can you briefly describe  
10 what list maintenance guidelines are?

11 A Certainly. Under the National Voter Registration Act  
12 state election offices are required to maintain voter  
13 registration roles. And to do so we compare our data to  
14 other trusted data sources, such as the National Change of  
15 Address data from the Postal Service. The State Police  
16 provide us felon data that we compare our data to. We  
17 obtain data from the Bureau of Vital Statistics, from the  
18 Department of Health for death records, as well as from  
19 Social Security Administration and as other sources along  
20 those lines. We also participate --

21 Q Mr. Davis, I don't mean to interrupt. Could you  
22 maybe slow down a little bit. We have a court reporter  
23 here who has to take down your answers.

24 A All right.

25 Q I will remind you if I catch you speeding up again.

Davis - direct

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1 We would appreciate it if you would just slow down a  
2 little bit.

3 A Certainly.

4 We also participate in several cross-state data  
5 exchanges with other chief election officials in other  
6 states to compare our voter registration records with the  
7 registration records in those states.

8 Q Thank you.

9 You have got a binder in front of you, Mr. Davis.

10 If I could you to take look at what is tab 16.

11 Your Honor, that is Defendants' exhibit 326.

12 THE COURT: Okay.

13 THE WITNESS: I might not have the same tab numbers.

14 MR. FINBERG: Tab 16?

15 May I approach the witness, Your Honor?

16 THE COURT: Yes, sir.

17 MR. FINBERG: Let me call out the exhibit number.

18 Sorry.

19 THE COURT: I don't see 326 in my binder as well. I  
20 do see, I am sorry.

21 MR. FINBERG: I think the issue is I have an earlier  
22 iteration that doesn't have tabs, that have the exhibit  
23 numbers. Mr. Davis has the exhibit numbers. So if I tell  
24 you Defendants' exhibit 326. Can you find 326 on the tab?

25 THE COURT: Maybe the third from the end.

Davis - direct

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1 MR. FINBERG: Yes. I apologize for the confusion.

2 BY MR. FINBERG:

3 Q If I could ask you to look at this document and let  
4 us know whether you recognize this?

5 A I do.

6 Q What is this document?

7 A This is the first report that our agency put out as  
8 required by the Code of Virginia on our list maintenance  
9 activities in the commonwealth.

10 Q Do you appear as an author of this document?

11 A I do.

12 MR. FINBERG: Your Honor, I would like to move this  
13 document into evidence.

14 THE COURT: Any objection?

15 MR. KAUL: No, Your Honor.

16 THE COURT: It will be received.

17 (Defendants' Exhibit 326 was  
18 offered and received in evidence)

19 BY MR. FINBERG:

20 Q What is voter regulation list maintenance activities?

21 A So this is where we compare our voter registration  
22 list with other trusted data sources to insure the  
23 accuracy of our data.

24 Q Are you personally involved in the list maintenance  
25 activities?

1 A Yes.

2 Q If I could direct your attention to pages ten and  
3 eleven of this exhibit.

4 Do you see the heading towards the bottom third of  
5 the page, other list maintenance activities, identifying  
6 moving voters?

7 A Yes.

8 Q What is the process that is described on page ten and  
9 eleven?

10 A This is our activity related to comparing our data  
11 with the national change of address data provided by the  
12 Postal Service. Where at least once a year as required  
13 under the National Voter Registration Act we match our  
14 voter registration data to the change of address data with  
15 the Post Office. When we find a match we then send a  
16 mailer to the voter's registration address by forwardable  
17 mail requesting that the voters confirm their registration  
18 record with the commonwealth.

19 If the voter fails to respond to that notice within a  
20 minimum of 30 days they will be moved from what is  
21 considered an active registration status to inactive  
22 registration status. Once --

23 Q What is the criteria then being moved from active to  
24 inactive?

25 A So in this occasion it would be where a voter has

Davis - direct

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1 moved according to what they have self reported to the  
2 Post Office and then failed to respond to our attempts to  
3 contact them.

4 Q All right.

5 A Once they are in an inactive status if that voter  
6 fails to update voter their registration record through a  
7 new voter registration form change of address, or the  
8 like, or if they fail to vote any time between the time  
9 they moved to inactive and the next two federal elections,  
10 which can span anywhere from two to four years depending  
11 on the timing of the mailing, they would then be canceled.

12 Q What is the effect of classifying voters inactive?

13 A The voter is still eligible to vote in the election  
14 as long as they show up to vote and provide proper  
15 identification. And they do, I believe, have to sign a  
16 statement of affirmation if they show up to vote  
17 confirming that they are still registered at that  
18 location, or still a resident at that location. There are  
19 some varied exceptions to that depending on the type of  
20 election I am not as well versed in.

21 Q Okay.

22 Essentially the moving of a voter from active to  
23 inactive status, is it an accurate to say that has to do  
24 with their participation in elections?

25 A Yes.

Davis - direct

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1 Q You can take that down.

2 Mr. Davis, are you familiar SB 1256?

3 A I am.

4 Q Do you have a general understanding as to the  
5 substance of SB 1256?

6 A Yes. It was the bill that now requires voters to  
7 provide proof of photo identification when they show up to  
8 vote in person.

9 Q Was your department in charge of any out reach  
10 efforts related to state bill 1256, or Senate bill 1256?

11 Excuse me.

12 A Yes.

13 Q What did your department do to assist in out reach  
14 efforts regarding SB 1256?

15 A The department did several activities. They hired a  
16 marketing firm to help coordinate advertisements, both  
17 with radio, billboards and bus ads. We also participated  
18 in social media out reach campaign where we leveraged our  
19 Twitter and Facebook accounts to try to spread the word  
20 about the photo ID requirements. And we also mailed  
21 86,000, approximately, post cards to voters who we  
22 identified did not have a DMV-issued photo identification  
23 card notifying of the law.

24 Q Let me ask you about that mailing you just described.  
25 Who were the intended recipients of that mailing?

Davis - direct

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1 A In that mailing they were voters, they were actively  
2 registered voters, meaning had not been moved to inactive  
3 status, who had done some sort of activity related to  
4 their voter record, either having registered or updated  
5 their registration, or having participated in elections  
6 going back to including the November 2012 federal general  
7 election.

8 Q How did you go about identifying the potential  
9 recipients of that mailing?

10 A We compared our data to the Department of Motor  
11 Vehicles data based off of social security number match.  
12 In this instance where we did not find a match with the  
13 Department of Motor Vehicles data, we assumed they did not  
14 have a DMV-issued photo ID card. And in doing so, we  
15 identified approximately 200,000 active voters that did  
16 not appear to have a DMV-issued card. We then looked at  
17 other sub-classes of voters, specifically individuals who  
18 notified they were members of military, or individuals who  
19 have a standing absentee status, absentee voting status  
20 with us, which could be military, overseas, and in some  
21 cases, disabled voters. In this case voters would be  
22 voting absentee, and would not be voting in person. So  
23 they would not need voter ID. We narrowed the window down  
24 to about 86,000 voters that we did the mailing to.

25 Q So one of the criteria was possession of DMV ID?

Davis - direct

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1 A Correct.

2 Q I ask you to take a look at plaintiffs' exhibit 55.

3 PX 55.

4 A Okay.

5 Q Do you recognize this document?

6 A I do. It's a report we published on our web site in  
7 the fall of 2014 outlining the counts by precinct of  
8 active and inactive voters, and it also provided by  
9 precinct the counts of active and inactive voters who did  
10 not appear to have a DMV record. And then a final column  
11 titled "filtered," which is that filtered criteria I just  
12 described. A definition of the filtered criteria appears  
13 on the final page. Page 40 at the bottom. That is where  
14 it is voters who self-identified as being military,  
15 overseas or federal only voter who does not have active  
16 FPCA, federal positive card application, or 7031 absentee  
17 application. Those are ongoing absentee voters. And also  
18 who had a last activity date in our system, or had  
19 participated in elections going back to the last  
20 presidential, which would have been the November 2012  
21 election.

22 Q You participated in creating the document that is  
23 exhibit 55?

24 A I did.

25 Q Plaintiffs' exhibit 55?

1 A I did.

2 Q Did you work with anyone inside the agency to  
3 identify appropriate mailing recipients?

4 A Yes. Commissioner Cortez and I developed the formula  
5 for the filtered count.

6 Q Did you provide the resulting data that is reflected  
7 in Plaintiffs' 55 to anyone outside the agency?

8 A Yes. This report and regular reports just like this  
9 were posted on our agency public web site so anybody in  
10 the world could have seen the reports.

11 Q Did you provide that data to any special interest  
12 groups?

13 A We did. That particular list of addresses that we  
14 mailed to was provided directly through the Freedom of  
15 Information Act request to the Democratic Party of  
16 Virginia, the Virginia New Majority, third party voter  
17 registration group. To the Advancement Project, another  
18 third party voter registration group. And the League of  
19 Women Voters in Virginia.

20 Q Do you know why you provided it to those  
21 organizations?

22 A They were also interested, from my understanding, of  
23 doing their own out reach to the same voters.

24 Q Did any of the special interest groups you just  
25 identified, Mr. Davis, request additional data regarding

Davis - direct

1010

1 active voters likely to vote in the 2014 election?

2 A We have a system in the commonwealth that allows any  
3 of those political party candidates and third party voters  
4 registration type groups to obtain data from us on a  
5 regular basis. So I know for the Democratic Party of  
6 Virginia receives data monthly from us on registered voter  
7 and absentee voting information. Any other groups could  
8 have. I'm not specifically familiar with their requests,  
9 though.

10 Q Did you have any way to evaluate or judge how you --  
11 strike that. Did you have any way to judge the efficacy  
12 of the mailing?

13 A Not the mailing specifically. However, the sheer  
14 lack of no ID provisional ballots cast in the  
15 November 2014 election in my opinion indicates that the  
16 out reach efforts were effective.

17 MR. KAUL: Object to that as statement of opinion.  
18 That he is not qualified.

19 THE COURT: I think we have to sustain the objection.  
20 I think he can testify to how many he received, but I  
21 don't know that he can gloss that with his opinion.

22 BY MR. FINBERG:

23 Q All right.

24 We will talk about the professional ballots later. I  
25 will move along.

Davis - direct

1011

1 And I think you answered this before, but was there  
2 social media-based out reach effort as well?

3 A Yes. We used our Twitter and Facebook accounts to  
4 help spread the record about the photo ID requirements.

5 Q Do you know whether there were any radio ads that  
6 were done?

7 A There were. Not familiar with all of the content of  
8 them, but there were radio ads done.

9 Q Did you have any other duties or tasks in connection  
10 with the implementation of SB 1256?

11 A Yes. My team actually built the software that is  
12 used by the 133 general registrar offices around the state  
13 to capture the photo and signature of individuals applying  
14 for the free photo ID. And then we print those IDs in our  
15 office?

16 Q Okay. Why did the State Board of Elections develop  
17 the free voter ID software internally?

18 A The initial plan had been to seek a vendor to build a  
19 system and support a system for us; however, through the  
20 procurement process there wasn't a viable vendor solution  
21 presented with the funding that was available. So, the  
22 agency administration turned to my team to see if we could  
23 do something, and we are able to build a system in just a  
24 couple of months using --

25 THE COURT: Would you explain how the system worked?

Davis - direct

1012

1 What the objective was of this system?

2 THE WITNESS: Sure. It is a very simple system. A  
3 member in the registrar's office can sign into the system.  
4 They can look up a voter. If a voter is not in the system  
5 already because maybe they are a new applicant, they can  
6 enter in the individual's name and information. They then  
7 use a web camera to capture the individual's photo. A  
8 signature pad to capture the individual's signature. And  
9 then submit that data packet to our office where we then  
10 process and make the photo ID.

11 THE COURT: This is through a process request by  
12 voters for the free identification that the registrar  
13 issues; is that correct, Mr. Davis?

14 THE WITNESS: Yes, sir.

15 THE COURT: Go ahead Mr. Finberg.

16 MR. FINBERG: Thank you, Your Honor.

17 BY MR. FINBERG:

18 Q Is there both a software and hardware component?

19 A Yes. We were able to leverage off-the-shelf web  
20 cameras and signature pads. And the software runs on  
21 Windows Seven or newer computers. So the individual  
22 offices provide the actual computer that they hook those  
23 devices up to and install our software on.

24 Q And does the software require an internet connection  
25 to work?

Davis - direct

1013

1 A It does not. We prefer that it run with the internet  
2 connection, but it can run in an offline mode. So the  
3 device, the computer can be taken out of the office to  
4 events, or maybe a nursing home facility by the local  
5 registrar to capture the data needed for photo IDs. It  
6 also served as an emergency backup in the event, like last  
7 night we had several areas that are now without power or  
8 internet access. We can still use the software. Once the  
9 internet access is restored, it automatically uploads to  
10 our system.

11 Q Did you conduct any in-person training for localities  
12 to learn how to use the software and the equipment?

13 A The Department conducted 13 in-person regional  
14 training sessions around the state in the summer of 2014.  
15 That is where we actually provided the hardware to the  
16 localities at those meetings.

17 And we also conducted training at our annual training  
18 events that we are required by law to provide, and the  
19 localities are required to attend. Both in 2014 and in  
20 2015. And additionally in the 2014 electoral board  
21 association annual meeting we were invited to present a  
22 training session on photo ID.

23 Q Okay.

24 Is the Department of Elections planning to conduct  
25 additional training in 2016?

Davis - direct

1014

1 A Yes. So we have our annual training event. It is  
2 not scheduled yet, but it will be this summer. We have to  
3 do procurement for that.

4 Q Did you conduct any kind of online training in  
5 connection with the free voter ID software and hardware?

6 A There were seminars conducted, and there are online  
7 training modules. There were online training modules as  
8 well that were provided by the agency.

9 Q And who has access to those online training modules?

10 A They would have been made available to the registrars  
11 and their offices. In some cases, officers of election.

12 Q Mr. Davis, do you know whether the State Board of  
13 Elections keeps track of the free voter ID it issues?

14 A Yes, sir. All of that data comes into our systems,  
15 and we track that with the individual voters when we issue  
16 IDs.

17 Q In your position as State Board of Elections chief  
18 information officer, do you have access to those records?

19 A I do.

20 Q Are you aware that there was a witness earlier this  
21 week by the last name of Polatty that testified?

22 A Yes, sir.

23 Q And subsequent to his testimony, did you have the  
24 opportunity to look up whether Mr. Polatty ever applied  
25 for a free voter ID?

Davis - direct

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1 A I did.

2 Q What did you find out?

3 A Mr. Polatty applied for a free photo ID in 2014 and  
4 2015. At the time of the election he was issued temporary  
5 ID both times. And a permanent ID both times. And our  
6 system, also, you know, IDs is -- we mailed the photo IDs  
7 to the voter registration address. If that ID comes back  
8 undeliverable, there is a place in our system the  
9 registrar is to record that. And neither one of the  
10 permanent IDs are recorded as being undeliverable.

11 Q Because they are not recorded as being undeliverable,  
12 what does that lead you to conclude?

13 A Our assumption at that point is that the Postal  
14 Service delivered it to the address we mailed it to.

15 Q I think now we are going to turn to the topic that I  
16 promised we would get to, this is, provisional ballots.  
17 In your role as State Board of Elections chief information  
18 officer, do you have access to the number of provisional  
19 no ID ballots cast in 2014?

20 A Yes.

21 THE COURT: You say 2014?

22 MR. FINBERG: 2014, Your Honor.

23 BY MR. FINBERG:

24 Q How do you have access to that information?

25 A So we have a report or data entry point in our system

Davis - direct

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1 on election night that we ask the 133 registrars to  
2 complete, which is a count of locality wide how many no ID  
3 provisional ballots were cast, and how many regular  
4 provisional ballots were cast.

5 Q Do you know how many localities in 2014 did not  
6 report provisional no ID ballots cast?

7 A Four localities did not complete their report.

8 Q That is four out of 133?

9 A Correct.

10 Q Based on the 129 localities that did report, do you  
11 have an estimate of the number of provisional no ID  
12 ballots that were cast in 2014?

13 A According to what the localities told us, it was just  
14 over 400.

15 THE COURT: That encompasses the entire 129 precincts  
16 or localities that reported?

17 A Yes, sir.

18 THE COURT: Okay.

19 These ballots were cast because no ID was produced at  
20 the polling place?

21 THE WITNESS: Correct.

22 THE COURT: Okay.

23 BY MR. FINBERG:

24 Q And that number of provisional no ID ballots, do you  
25 know -- do you know what the total number of provisional

Davis - direct

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1 ballots was? Cast for whatever reason.

2 A In 2014?

3 Q In 2014.

4 If you don't know, is fine.

5 A I don't recall.

6 Q I don't want you to guess.

7 A Sorry.

8 Q If I could ask you to look at plaintiffs' exhibit

9 162.

10 Mr. Davis, are you familiar with this document?

11 A Yes, sir.

12 Q What is this document?

13 A This is the report that I was referring to in the

14 previous question. It would appear that the 400 I gave

15 was incorrect. It appears to be 773. My memory fails me.

16 I apologize.

17 Q So --

18 THE COURT: 773?

19 THE WITNESS: Correct.

20 THE COURT: Okay.

21 BY MR. FINBERG:

22 Q Just so the record is clear, though, after reviewing

23 plaintiffs' exhibit 162, what do you believe the correct

24 number of provisional no ID ballots cast in the 2014

25 election?

Davis - direct

1018

1 A 773 based on what was reported to us that night.

2 And then the answer to the other question, if I may,  
3 about how many total were cast? It was a total number of  
4 provisional ballots in 2014 as reported to us was 3,622.

5 Q In your role as State Board of Elections chief  
6 information officer do you have access to the number of  
7 provisional no ID ballots that were cast in the 2015  
8 election?

9 A Yes, sir.

10 Q Do you know what the response rate was from the  
11 different localities in terms of reporting that  
12 information to the State Board?

13 A We had 27 localities that did not report out of the  
14 133.

15 THE COURT: How much?

16 THE WITNESS: Twenty-seven.

17 BY MR. FINBERG:

18 Q Based on the 106 localities that did report, do you  
19 have an estimate of the number of provisional no ID  
20 ballots that were cast in 2015?

21 A I believe that number was the 400 number that was in  
22 my head.

23 Q Let's take a look, then, at defendants' exhibit 225.

24 THE COURT: 225.

25 MR. FINBERG: 225, Your Honor.

Davis - direct

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1 BY MR. FINBERG:

2 Q Do you recognize this document, Mr. Davis?

3 A Yes, sir. It is the same report that we just looked  
4 at, only for the 2015 election instead of 2014 election.

5 Q This was a report that was generated by the  
6 Department of Elections in the regular course of business?

7 A Yes, sir.

8 Q Something that you were involved in producing.

9 A Yes, sir.

10 Q I move its admission, Your Honor.

11 THE COURT: 225?

12 MR. FINBERG: 225.

13 THE COURT: Any objection?

14 MR. KAUL: No, Your Honor.

15 THE COURT: It will be received.

16 (Defendants' Exhibit 225 was

17 offered and received in evidence)

18 BY MR. FINBERG:

19 Q So we can verify that the numbers that you just  
20 testified about are accurate, looking at this report, what  
21 is the number of provisional no ID ballots that were cast  
22 in 2015?

23 A 408.

24 Q And do you know the number of total provisional  
25 ballots that were cast in 2015?

Davis - direct

1020

1 A Based on what was reported to us in this report 1763.

2 Q Mr. Davis, during the course of this litigation have  
3 you been involved in the State Board of Elections document  
4 production?

5 A Yes, sir.

6 Q Probably more than you wanted to be.

7 A Yes, sir.

8 Q Did you identify voter histories for individuals who  
9 were going to testify in this case?

10 A Yes, I did.

11 MR. FINBERG: Your Honor, I spoke to your courtroom  
12 clerk about this earlier. The voter histories have been  
13 designated as attorneys' eyes only under the protective  
14 order in this case. They were previously the subject of  
15 order sealing one of the previous filings based on that  
16 ground.

17 I am going to run through some of the voter histories  
18 with Mr. Davis. I would ask that they not be displayed on  
19 the public two large monitors. They are in the notebooks  
20 that are in front of witness and Your Honor.

21 THE COURT: All right.

22 MR. FINBERG: And what I would propose is, we did not  
23 lodge them with the clerk's office.

24 THE COURT: I understand. Protected by statute. I  
25 did a carve out in my discovery order to protect that.

Davis - direct

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1 MR. FINBERG: We will lodge them separately with the  
2 Clerk after they are admitted --

3 THE COURT: All right.

4 MR. FINBERG: -- in its own separate binder.

5 THE COURT: All right. That is fine.

6 MR. KAUL: We don't object to that.

7 THE COURT: You don't object. Okay.

8 BY MR. FINBERG:

9 Q So, Mr. Davis, let me ask you to take a look at  
10 defendants' exhibit 240.

11 THE COURT: Defendants' 240.

12 MR. FINBERG: 240, Your Honor.

13 BY MR. FINBERG:

14 Q Can you put it up there?

15 Mr. Davis, what is defendants' exhibit 240?

16 A This is a report from the voter registration system  
17 for the commonwealth that provides an overview of voter  
18 records, an individual's voter record.

19 Q Okay. So that the Court understands, what is  
20 contained in these documents? Let me ask you to run  
21 through some of the different fields that are contained in  
22 the voter history.

23 What information is provided in the -- first of all,  
24 what is the name of the voter in this?

25 A Mary Joanna Jones.

Davis - direct

1022

1 Q What information is provided in the overview section?

2 A Here we have the voter ID number, which is our  
3 identification number for each individual voter. Their  
4 gender. The year of their birth. We do have their full  
5 date of birth in our system, but for security purposes  
6 only. We don't publish that when we can help it.

7 Their registration status, and in the case of this  
8 voter her status is active. The registration address.  
9 The locality of registration, which in the case here would  
10 be Albemarle County. The voter's precinct, which is  
11 precinct 601 Crozet. The last date they voted. In this  
12 voter's case would have been November 2015. And last  
13 activity date, which in this case was the last time of the  
14 voter voted. If we have an electronic signature on file,  
15 it would appear as well. And there is also a long  
16 preference.

17 Q Mr. Davis, what is the difference between last vote  
18 date and last activity date?

19 A So, let's suppose that Ms. Jones submitted a voter  
20 registration form in January of 2016. Her last activity  
21 date would reflect that date, whereas her last vote date  
22 was the last time that she voted.

23 Q Let's move down this document to the registration  
24 history section.

25 If you could just describe to the Court what is

Davis - direct

1023

1 reflected in the registration history section?

2 A So, this shows essentially the information that would  
3 have been on our registration form received by the  
4 locality, or the department for this voter. So this voter  
5 had a record that was in existence from February 1981  
6 through October 2015. And she updated her registration  
7 through a form. It doesn't appear her address or anything  
8 like that changed, but we get duplicate registrations of  
9 that fairly frequently in our world.

10 Q Let's move down and talk about the voting history  
11 section.

12 A Shows the voter's history in elections. So you can  
13 see this voter voted in each of the November general  
14 elections going back to 2005. Actually continues on to  
15 the second page, all the way back to 2003. It appears  
16 maybe she missed the 2009 and '11 elections in there. But  
17 you can see what we looking at it. You can also see if  
18 she voted absentee. And in those elections whether she  
19 cast a provisional ballot in those elections. If it was a  
20 provisional, whether it was counted or not.

21 Q Along those lines, let me direct your attention to  
22 the entry in Ms. Jones' voter history for the 2014  
23 November general election. Do you see that?

24 A I do.

25 Q What does this document tell you about Ms. Jones'

Davis - direct

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1 experience voting in that election?

2 A Ms. Jones cast a provisional ballot and it was  
3 counted.

4 MR. FINBERG: Your Honor, I am going to get the  
5 witness to identify the following exhibits as being the  
6 exhibits for witnesses who have testified during the case.  
7 Not intending to go through them one by one with him.

8 THE COURT: I appreciate that very much.

9 They will be in evidence, and I can review them as  
10 necessary.

11 MR. FINBERG: That is the intention, Your Honor.

12 THE COURT: Fine. Proceed.

13 BY MR. FINBERG:

14 Q Can you please take a look at Defendants' trial  
15 exhibit 241.

16 A Yes, sir.

17 Q Whose voting history is exhibit 241?

18 A Ellen Lamb.

19 Q Thank you.

20 If you can go to trial exhibit 243, please.

21 A Okay.

22 Q Whose voting history is contained in exhibit 243?

23 A I apologize to the voter for the pronunciation of the  
24 name.

25 Q Could you spell it instead of pronouncing it, then?

Davis - direct

1025

1 A Sure can. Josephine Okiakpe. Last name is spelled  
2 O-K-I-A-K-P-E.

3 Q Thank you, Mr. Davis.

4 Look at exhibit 247, defendants' exhibit 247.

5 A Okay.

6 Q Whose voting history is that?

7 A Laning Polatty.

8 Q Defendants' exhibit 248, please.

9 A Okay. This is Sharon -- Shanna Samson.

10 Q Defendants' exhibit 249, Mr. Davis.

11 A Bobbie Lee Smith.

12 Q Defendants' exhibit 250?

13 A Karen Stallings.

14 Q Defendants' exhibit 251?

15 A Jennifer C. Litton Tidd.

16 Q Defendants' exhibit 255?

17 A Clayton Stallings.

18 Q Defendants' Exhibit 270?

19 THE COURT: What was the last number? I'm sorry.

20 MR. FINBERG: Quite all right, Your Honor.

21 251 was the last.

22 THE COURT: I got that one.

23 MR. FINBERG: Then 255.

24 THE COURT: Thank you. Go right ahead. Didn't mean  
25 to interrupt you.

Davis - direct

1026

1 THE WITNESS: 270 is that where we are at?

2 BY MR. FINBERG:

3 Q 270, yes.

4 A Barbara Hawkins Lee.

5 Q 231. Defendants' 231.

6 A I am missing. It must be out of order. 231.

7 Charles Steven Benagh B-E-N-A-G-H.

8 Q Defendants' exhibit 234?

9 A Megan Lynn Cotten.

10 Q Defendants' exhibit 237?

11 A Jack Nixon Etheredge.

12 Q And defendants' exhibit 238?

13 A Pettus Hilt, H-I-L-T.

14 MR. FINBERG: Your Honor, if memory serves me, I  
15 think we have forgotten to include one for Abe Barranca,  
16 which I would ask permission to proffer at a later time.

17 THE COURT: You may submit that.

18 MR. KAUL: We have no objection.

19 THE COURT: Any objection to these exhibits?

20 MR. KAUL: No, Your Honor.

21 THE COURT: They will be received without objection.

22 (Defendants' exhibits 231, 234, 237, 238,

23 241, 243, 247, 248, 249, 250, 251, 255, 270,

24 were offered and received in evidence)

25 MR. FINBERG: Thank you.

Davis - cross

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1 No further questions for Mr. Davis.

2 THE COURT: Cross examination of Mr. Davis?

3 MR. FINBERG: Thank you.

4 THE COURT: Yes, sir.

5 CROSS EXAMINATION

6 BY MR. KAUL:

7 Q Mr. Davis, how you doing today?

8 A Doing okay. Thank you.

9 Q My name is Josh Kaul, one of the attorneys for the  
10 plaintiff in this case. Let me start out by asking you  
11 about the voter history we just reviewed.

12 A Okay.

13 Q Who submits the information that is used to generate  
14 those files?

15 A The local registrars.

16 Q So that is not something that your office -- not  
17 based on data that your office generates, you just collect  
18 it?

19 A Correct.

20 Q Would it be fair to say local registrars sometimes  
21 make mistakes on data they send you?

22 A Yes.

23 Q Sometimes they don't even send you the data they are  
24 supposed to, it looks like, right?

25 A Correct.

Davis - cross

1028

1 Q Speaking of which, in 2014 the provisional count, you  
2 said four localities didn't provide data?

3 A Correct.

4 Q And this was plaintiffs' 162, if you want to look at  
5 it.

6 Looking at the exhibit I see asterisks next to  
7 Rockingham County, but it doesn't spell out which  
8 localities didn't provide data. Do you know which four  
9 they were?

10 A Yes. Looking at the report where it says "not  
11 reported," which is also with the asterisk, means that  
12 would indicate the localities that did not report. So in  
13 this case Amhurst.

14 Q Which one are you looking at?

15 A The 2014 report, exhibit 162.

16 Q Is this plaintiffs' or defendants'?

17 A Plaintiffs', sorry.

18 THE COURT: What exhibit number are you referring to  
19 at this point?

20 MR. KAUL: Sorry. 162. I just learned my exhibit is  
21 two-sided.

22 THE COURT: Plaintiffs' 162. Okay.

23 BY MR. KAUL:

24 Q Actually four counties.

25 A Correct. We use the term "localities" because cities

1 and counties are independent units.

2 Q And you don't know how that affected the total,  
3 right?

4 A Not from this report, no.

5 Q Do you know any other way?

6 A We don't have a statewide record that provides a  
7 count beyond that. So I don't have that number.

8 Q All right.

9 In 2015, this is plaintiffs' -- I don't know if 162  
10 was moved or not, but if it wasn't, I would move it in.

11 MR. FINBERG: I was under the assumption --

12 THE COURT: It was not moved in.

13 MR. FINBERG: I used it. Any objection I might have  
14 had was probably waived at that point.

15 THE COURT: I will receive it without objection.

16 Go ahead right. You are right, it was not in  
17 evidence.

18 (Plaintiffs' Exhibit 161 was  
19 offered and received in evidence)

20 BY MR. KAUL:

21 Q Plaintiffs' 161 was data for 2015, right?

22 A I don't know that I have Plaintiffs' 161 in front of  
23 me.

24 Q Sorry. Defendants' 225?

25 A 225, Defendants' exhibit, is the 2015 report.

Davis - cross

1030

1 Q At that time you said that the 27 localities didn't  
2 report.

3 A Correct.

4 Q So clearly the numbers here are going to be an under  
5 count of the total numbers for 2015, right?

6 A Correct.

7 Q So, first of all, everybody who is listed as a no ID  
8 provisional is somebody who had to cure their ballot  
9 somehow in order to have that are ballot counted, right?

10 A Correct.

11 Q All right.

12 In both of these elections about half of the people  
13 who cast provisional ballots cured them, and about the  
14 other half their votes weren't counted; is that right?

15 A I do not know the statistics on that. Sorry.

16 Q You have the total number of no ID provisionals?

17 A Correct.

18 Q Do you have any data on the number of people who  
19 showed up to vote who learned they didn't have the  
20 appropriate ID and then left the polling place?

21 A No.

22 Q Do you have any data on the number of people who just  
23 didn't show up to vote because of the ID requirement?

24 A No.

25 Q The data regarding provisional ballots, is that data

Davis - cross

1031

1 that the localities are required to provide to you?

2 A It is complicated question. They are required to  
3 enter the details of provisional ballots that are counted  
4 into our system. If it is a registered voter and for some  
5 reason it is not counted they are supposed to enter it as  
6 well. If it's somebody who is not yet registered at the  
7 area it is a little more gray whether they are required to  
8 enter it or not.

9 Q But you are at least supposed to get the provisional  
10 ballot counts for each locality, right?

11 A Yes. The data entry that generates the two reports  
12 we have been looking at here is not required of them to  
13 enter it. It is requested. They do, because we get  
14 questions on election night from media and the parties  
15 about how many provisional ballots were cast.

16 Q Okay. So in 2015, 27 counties ignored that request?

17 A Yes.

18 Q Did that raise any concerns within the agency?

19 A Certainly.

20 Q Did you take any steps to address that?

21 A We asked nicely to fill it out.

22 Q Would it be fair to say you are limited in the degree  
23 to which you can exercise control over the localities by  
24 resource constraints and a variety of other factors?

25 A And legal constraints and things, yes, sir.

Davis - cross

1032

1 Q Are there other areas the counties don't follow your  
2 requests?

3 A So our agency's mission is to provide uniformity, so  
4 we provide procedures and guidance and training for that.  
5 We don't have an enforcement arm or power in most cases to  
6 enforce compliance. Except for in very certain areas that  
7 I am not all that familiar with. But it is an on-going  
8 problem for the agency.

9 Q Okay. You talked a little bit about out reach. You  
10 are not in the out reach department, right?

11 A No, sir.

12 Q And you talked about having done a filtered mailing,  
13 is that right?

14 A Yes, sir.

15 Q And what that means is that you didn't send your  
16 mailing to all active voters, you picked a subset to send  
17 it to?

18 A Correct.

19 Q What percentage of registered voters did you send  
20 that to approximately?

21 A There were approximately five point two million  
22 registered voters, and we mailed to 86,000. My math is  
23 not that great. I apologize.

24 Q You didn't just filter from active voters, you also  
25 filtered among the population of people who didn't have

Davis - cross

1033

1 DMV ID, correct?

2 A Based on, I believe it was 55 -- the total number of  
3 active voters without ID was just shy of 200,000, and we  
4 mailed to 86,000.

5 Q Why didn't you mail it to all 200,000 or so?

6 A The agency has limited resources, so we were trying  
7 to use our resources to the best that we could.

8 Q If you are going to appropriate more money for out  
9 reach, you could have mailed to everybody who didn't have  
10 a DMV identity?

11 A Certainly.

12 Q Would you like to have done that?

13 A We would like to do a lot of things in our agency  
14 with proper funding.

15 Q Were you at the State Board of Elections in 2012 when  
16 the 2012 ID law was being implemented?

17 A Yes.

18 Q When the 2012 law was implemented did the agency send  
19 out voter registration cards?

20 A Yes, sir. The 2012 law, the implementation time line  
21 occurred at the same time that congressional redistricting  
22 was completed in the commonwealth. And as result the law  
23 requires us to provide voter cards for impacted voters.  
24 And at that time a voter card combined with a brochure was  
25 sent to all actively registered voters in the

1 commonwealth.

2 Q To be clear about that. Voter cards were sent to a  
3 number of voters in relation to redistricting prior to the  
4 2012 mailing, right?

5 A Redistricting during that cycle was quite an  
6 interesting time in our office and still is. We get to do  
7 it again in a couple weeks. I am so excited. So the  
8 General Assembly did their state districts in 2011. And  
9 then the congressional districts in 2012. And because of  
10 that, and because of some special elections and things  
11 that ended up being done in like three or four different  
12 phases I forget the exact breakout. We did lots of  
13 batches of voter cards over the course of that time  
14 period.

15 Q You say you send those voter cards in connection with  
16 redistricting to any voter whose district from one of the  
17 different offices had changed because of redistricting?

18 A Correct.

19 Q It wouldn't be state-wide, it would just be the  
20 subset of people impacted?

21 A It ended up -- sorry. Trying to remember the full  
22 details on that.

23 Most voters received two voter cards over that two  
24 year time period, but we did that final mailing at that  
25 time just because there had been so much fog and confusion

Davis - cross

1035

1 to get that information out there to make sure folks know  
2 where they were supposed to vote. It also provides the  
3 poll location.

4 Q So in connection with the 2012 voter ID law, though,  
5 the Governor insured that money was available to send  
6 voter registration cards, which at the time would be used  
7 to vote to every registered voter in Virginia, right?

8 A I don't know who insured the funding was there or  
9 not, but I believe the Federal Help America Vote Act was  
10 used for that mailing.

11 Q In 2012 everybody got a permissible form of ID.

12 A Active voters, yes, sir.

13 Q And in the 2013 law you contacted only 88,000.

14 A Approximately, yes, sir.

15 Q Because of limited in funds, right?

16 A Yes, sir.

17 Q Let me ask you about mobile ID units.

18 A Okay.

19 Q What does a locality need to have a mobile free voter  
20 ID unit. Before I ask that, could you explain what that  
21 is?

22 A Sure. They need a computer, a Windows seven or  
23 better computer they can take with them that has a place  
24 to plug in a web camera and a signature capturing device  
25 that has our software installed. It could be a lap top,

Davis - cross

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1 could be a Windows tablet, or desk top if they wanted to  
2 hoof it around with them.

3 Q But you need a camera with the software, you said?

4 A Correct.

5 Q And so every jurisdiction, every locality has a set  
6 up at their general registrar's office, right?

7 A Correct.

8 Q And so if a locality wants to do mobile units, they  
9 would need to get an additional camera, correct?

10 A Correct. We provided all the localities with a quote  
11 from a state vendor for purchasing additional cameras and  
12 signature pads if they wanted to do so.

13 Q And it is my understanding that Fairfax is the only  
14 county you know that has an extra camera?

15 A To my knowledge, the only one I am aware of.

16 Q So that means that Fairfax is the only county you are  
17 aware of that has a mobile unit for free IDs?

18 A That I am aware of, yes.

19 There was no requirement to tell us that they had a  
20 mobile unit, so I just know because Fairfax bought the  
21 wrong equipment when they started. So I got involved to  
22 fix that.

23 Q As a member of the agency you weighed in with your  
24 colleagues about whether expired forms of identification  
25 should be accepted for voting; is that right?

Davis - cross

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1 A I was not involved in the policy decisions in regards  
2 to that. But I was involved in the decision to not put an  
3 expiration date on the IDs that we print.

4 Q The same thing Ms. Cherry was just informing me of.

5 A Okay.

6 Q So, what position did you take in that, in that  
7 discussion?

8 A For logistics and cost reasons we, and for lack of  
9 specific direction in the law, we did not put an  
10 expiration date on the photo IDs that we printed.

11 Q Also because there was no reason to have an  
12 expiration date for an identification form, correct?

13 A The law did not tell us it needed to have one. So we  
14 were trying, we try to implement minimally when it comes  
15 to things like that.

16 Q You discussed one of the matching analyzes that the  
17 agency conducted, which I guess would be the most recent  
18 one; is that right?

19 By matching analyzes, I mean analyzes that you use  
20 comparing the DMV data to voter registration to determine  
21 how many voters didn't have a DMV identification. The one  
22 that you have talked about on direct, the most recent  
23 version of that analyzes.

24 A We receive a new file every month from the Department  
25 of Motor Vehicles, and have our automated process that

Davis - cross

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1 matches voters to that data every month. But in terms  
2 actually doing analyzes of it, I have not looked at it  
3 personally in quite some time.

4 Q Okay.

5 Now, you generated at least one of those matching  
6 analyzes before the voter ID law was passed; is that  
7 right?

8 A Yes, sir.

9 Q Do you know why that was generated?

10 A It would have been at the request of the agency  
11 leadership at the time. Probably during the legislative  
12 cycle.

13 Q Let me have Plaintiffs' exhibit 97 brought up to the  
14 screen.

15 I am going to ask you to take a look at that. If we  
16 could scroll through the three pages.

17 Did we pass page two? I think. All right.

18 So, go back to page three. Do you recognize this  
19 document?

20 A It looks like something that I produced. I don't see  
21 a date on it, so I don't know like when it was run, but it  
22 is a format of something that I would produced.

23 Q To the best of your understanding you produced this?

24 A Correct.

25 Q And this is one of those matching tables, correct?

1 A Yes.

2 Q In the far -- well, there are titles to each column,  
3 correct?

4 A Yes.

5 Q Each column?

6 I want to be clear. Inactive voters, are they  
7 eligible to vote?

8 A Yes, sir.

9 If they sign their affirmation of identity when they  
10 show up.

11 Q What do you mean by that?

12 A I believe there is a form they have to sign if they  
13 show up to vote and they are flagged as inactive in our  
14 system.

15 Q What are they signing? What are they attesting to?

16 A They are still a resident I believe at that  
17 registration address.

18 Q There are not identification required for that?

19 A Nothing additional that -- outside the other  
20 identification requirements that I am aware of.

21 Q You were describing before what filtered and active  
22 and inactive meant, right?

23 A Yes, sir.

24 Q And the filtered inactive voters, did they receive,  
25 those people who did receive your contacts?

Davis - cross

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1 A The inactive voters did not receive a mailing from us  
2 in 2014 or in 2012.

3 Q This indicates that as of the time that this was  
4 generated, which you are not sure of, there were just  
5 under 200,000 active voters who had no DMV ID in Virginia?

6 A Correct.

7 Q Another 120,000 inactive voters with no DMV ID?

8 A Correct.

9 Q All of those 120,000 are eligible Virginia voters  
10 right? Let me rephrase that.

11 All registered to vote in Virginia, and can vote with  
12 that registration so long as they fill out the affirmation  
13 you described?

14 A That is my understanding, yes, sir.

15 Q Then I will ask to bring up Plaintiffs' 156.

16 While she is doing that, Your Honor, I move  
17 Plaintiffs' exhibit 97, which is the one I was just  
18 showing.

19 MR. FINBERG: Already in without objection.

20 THE COURT: Okay.

21 BY MR. KAUL:

22 Q I believe this will provide clarity as to the date.

23 A Yes, sir.

24 Q This is --

25 THE COURT: What was the number of this exhibit?

1 Sorry.

2 MR. KAUL: This is 156.

3 THE COURT: 156. All right.

4 This is already in evidence, is that correct?

5 MR. FINBERG: This one is not, but we have no  
6 objection.

7 THE COURT: All right. Plaintiffs' 156 will be  
8 received.

9 (Plaintiffs' Exhibit 156 was  
10 offered and received in evidence)

11 BY MR. KAUL:

12 Q Thank you, Your Honor.

13 This is the same basic data, but you have slightly  
14 different categories of data here; is that right?

15 A Yes.

16 Q And so this indicates data generated as of September  
17 of 2014?

18 A Correct.

19 Q This one has columns that refer to out reach target  
20 and out reach target percentage. Do you see that?

21 A I do.

22 Q What does that mean?

23 A I do not know. Is there a second page maybe where  
24 the asterisk has a definition?

25 Q That is a very good idea. There we go.

Davis - cross

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1 A This is the same definition I provided earlier in my  
2 testimony of the filtered counts.

3 Q So the out reach target reflects the filtered count?

4 A That is what it appears, yes, sir.

5 Q All right.

6 The target percentage would be the percentage of  
7 active voters who are in the filtered count in the  
8 locality, is that right?

9 A That would be my assumption without a calculator.

10 Q I won't hold you to the math.

11 A Thank you.

12 Q You have also statistics regarding the number of free  
13 IDs issued; is that right?

14 A Yes, sir.

15 Q I am going to run through those documents to confirm  
16 they are what they appear. If counsel has no objection, I  
17 will do it that way. I have got Plaintiffs' exhibit 56.

18 THE COURT: Fifty-six.

19 MR. KAUL: 153.

20 THE COURT: 153.

21 MR. KAUL: And 163.

22 THE COURT: Any objection, Mr. Finberg?

23 MR. FINBERG: No, Your Honor.

24 THE COURT: It will be received.

25 (Plaintiffs' Exhibit 153 and 163

Davis - cross

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1           were offered and received in evidence)

2           THE COURT:   These are what?

3           MR. KAUL:   Are charts that you have prepared showing  
4 the number of voters who have obtained the no fee or free  
5 voter ID, correct?

6           THE WITNESS:   Correct.

7 BY MR. KAUL:

8 Q       I'm not sure if you have had a chance to look, but do  
9 those appear to be charts of that to you?

10 A       Yes, sir.

11 Q       And they are data broken down by locality, among  
12 other things.

13 A       Yes, sir.

14           MR. KAUL:   May I confer with Mr. Finberg just a  
15 moment, Your Honor?

16           THE COURT:   Yes, sir.

17 BY MR. KAUL:

18 Q       Briefly I want to ask you, have you could you call up  
19 Plaintiffs' exhibit 66.

20           I am going to ask Ms. Schultz to briefly scroll  
21 through this and ask if you recognize it.   So do you  
22 recognize that?

23 A       I have seen this report before, yes, sir.

24 Q       What is this?

25 A       From -- my understanding is that it is a report that

Davis - cross

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1 was produced out of a survey that was by our agency asking  
2 for this information from the different localities.

3 Q This is a survey in which you collected the number of  
4 voters who used an affirmation of identity to establish  
5 their identity before the 2012 voter ID law was passed, is  
6 that right?

7 A It covers '08 and '12 elections.

8 THE COURT: 2008 to 2011?

9 THE WITNESS: '12. Through the March primary.

10 THE COURT: Thank you.

11 BY MR. KAUL:

12 Q That is because of the voter ID law in 2012 wasn't in  
13 effect until after the primary, right?

14 A I believe so, yes, sir.

15 MR. KAUL: Your Honor, I would move in as plaintiffs'  
16 exhibit 66.

17 THE COURT: Any objection?

18 MR. FINBERG: Your Honor, my objection is this. I  
19 don't believe that he established a proper foundation that  
20 this is a document that came from the State Board or this  
21 witness had any part in generating.

22 THE COURT: You may want to firm that up. He was  
23 very equivocal. So why not explore that a bit?

24 BY MR. KAUL:

25 Q I appreciate that.

Davis - cross

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1 Is this a document that you reviewed in the course of  
2 your work with either the State Board or Department of  
3 Elections?

4 Let me ask a different way. You said you have seen  
5 this before, right?

6 A Yes, sir.

7 Q Where did you see it?

8 A In the process of providing information for this  
9 case.

10 Q So you produced this document in discovery.

11 A I was involved in the collection of all that, so it  
12 was part of the stuff that I would have turned over.

13 Q And the documents you were producing were documents  
14 that were Department of Elections or State Board of  
15 Elections documents; is that right?

16 A Correct.

17 MR. FINBERG: The issue, I guess, Your Honor, is that  
18 everything that was produced by the Department, by the  
19 defendants in this case has a bates number on it.

20 THE COURT: A what?

21 MR. FINBERG: A bates number on it with the VSB  
22 prefix, and this document does not have the VSB prefix. I  
23 am not sure where it came from.

24 THE COURT: You may not be able to get it in, but you  
25 can refresh his recollection, if you can, and have him

Davis - cross

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1 testify to it.

2 MR. KAUL: Just to respond. My understanding is that  
3 the documents produced in native format, like EXCEL  
4 sheets, does not have a bates number, which is why this  
5 one does not.

6 MR. FINBERG: On the exhibit list it is noted that it  
7 has a TLF prefix.

8 MR. KAUL: Oh. I see.

9 Did you produce documents in response to a FOIA  
10 request in this case?

11 THE WITNESS: Yes.

12 MR. FINBERG: FOIA is separate from the case.

13 MR. KAUL: I apologize.

14 BY MR. KAUL:

15 Q I was confused. This is one of the documents you  
16 produced in response to FOIA?

17 A I don't remember the specifics of that, but I am the  
18 person who provides all of that stuff for a FOIA request  
19 in our agency.

20 Q Let me ask this way.

21 A Certainly.

22 Q Are you certain you provided this document in  
23 response to either to a FOIA request or a production  
24 request in this case?

25 A I am reasonably certain it was something that I

Davis - cross

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1 provided in the course of my job. I don't remember the  
2 specifics of which response it would have been part of.

3 MR. KAUL: Your Honor, I believe that is certainly a  
4 preponderance of the evidence that this is a document in  
5 their possession.

6 THE COURT: To say it is in is to be generous, but I  
7 will let it in. Actually, in the interest of the  
8 shortness of life. Okay. All right. I will let it in.

9 (Plaintiffs' Exhibit 66 was  
10 offered and received in evidence)

11 BY MR. KAUL:

12 Q All right.

13 I think we already talked about what is in the  
14 document. I will leave it at that.

15 The DMV matching analysis that you have conducted,  
16 how, if at all, are expired DMV licenses accounted for in  
17 that analysis?

18 A We only receive -- the monthly file we receive is  
19 just the people who currently have a license with DMV.

20 Q If somebody has an expired license are they listed as  
21 having one?

22 A No. I don't have expiration dates or anything like  
23 that from DMV. I just get a list of, here everybody who  
24 has a DMV license today.

25 Q Do you know if they include expired licenses on that

1 list?

2 A Not included as far as I am aware.

3 Q But the DMV, I guess, would know best.

4 A Yes.

5 Q Do you know if suspended licenses are included on  
6 that list?

7 A I don't believe that they are. But I don't have --  
8 there is not a flag to indicate whether a license is  
9 suspended or not.

10 Q You are not certain?

11 A Not a hundred percent, no, sir.

12 Q What about lost licenses. Presumably would be  
13 included on the list unless that were reported, right?

14 A Yes.

15 Q And what about revoked licenses? Again, fair to say  
16 you don't know for sure?

17 A My understanding is revoked is not included. That  
18 would be a Department of Motor Vehicles that would remove  
19 that license as being a license.

20 Q DMV would be the best source?

21 A Correct.

22 Q No further questions.

23 THE COURT: Redirect?

24 MR. FINBERG: Very brief.

25 THE COURT: All right.

Davis - redirect

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REDIRECT EXAMINATION

BY MR. FINBERG:

Q Mr. Davis, you were asked some questions about that spread sheet that was Plaintiffs' exhibit 66. Do you recall? It's the one produced in response to the FOIA request.

A Yes, sir.

Q Do you know the source of the data in that document?

THE COURT: Excuse me. What document are you referring to? I didn't catch it.

MR. FINBERG: Plaintiffs' 66.

THE COURT: 66. Go ahead. Sorry.

THE WITNESS: It would have been the result of a survey, online survey process that our agency requested the localities respond to.

BY MR. FINBERG:

Q Mr. Kaul asked you some questions about mobile units and web cams and signature pads. Do you recall that?

A Yes, sir.

Q What is the cost for a web cam?

A The two devices that we purchased, one was about \$75 and the other one was about \$140. I don't remember which was the web cam and which was the signature pad.

Q Would any web cam that somebody could pick up at Best Buy work for this purpose?

Davis - redirect

1050

1 A Potentially it could. We specifically went with a  
2 specific model so we could support it with our resources.

3 Q Okay. But the cost of the two pieces of equipment  
4 combined would be how much?

5 A Approximately \$220. Again, my math may not be  
6 correct.

7 Q Better than mine, I guarantee you that.

8 Mr. Kaul asked you some questions about the  
9 approximately 88,000 people that received the mailing.

10 A Okay.

11 Q Just so we are clear, how did the Department go about  
12 making a determination of who those 88,000 people should  
13 be?

14 A We looked at what information we had available to us  
15 so that we could best use the resources available. If a  
16 voter self-indicated being a member of military, the  
17 assumption was made they had a Department of Defense  
18 issued identification card. If they had taken action to  
19 be on absentee, absentee voter, they will be voting by  
20 mail, would not have to show a form of photo  
21 identification. So they were excluded. And then we  
22 looked at whether there was someone who was in our opinion  
23 more likely to show up to vote in an up-coming election.  
24 So we looked at people with some form of voter activities  
25 over the last roughly two years at the time.

Davis - redirect

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1 Q I don't have any further questions, Your Honor.

2 THE COURT: May Mr. Davis be excused?

3 MR. FINBERG: He may, Your Honor.

4 MR. KAUL: Yes.

5 THE COURT: Thank you for coming in. We appreciate  
6 your testimony.

7 (Witness stood aside)

8 Does anybody have a short witness?

9 MR. SPIVA: I think the witness that we have is  
10 probably fairly short, but I don't know how long the cross  
11 will be.

12 THE COURT: We will go ahead with direct and hope the  
13 cross will be short. Okay?

14 Call the next witness.

15 MR. SPIVA: Your Honor the plaintiff calls Rebecca  
16 Slutzky, Executive Director of the Democratic Party of  
17 Virginia.

18 THE COURT: All right.

19 Come forward. Is she here? Yes, come forward.  
20 Raise your right hand, left on the Bible, face the Clerk  
21 of the Court.

22 BARBARA SLUTZKY

23 WAS SWORN AND TESTIFIED AS FOLLOWS:

24 THE COURT: She is your witness?

25 MR. SPIVA: Yes, Your Honor. Yes.

Slutzky - direct

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1 THE COURT: All right.

2 DIRECT EXAMINATION

3 BY MR. SPIVA:

4 Q Good morning, Ms Slutzky.

5 A We can go with that.

6 Q Okay. Where you do you work?

7 A At the Democratic Party of Virginia.

8 Q How long have you worked there?

9 A I started May 2015.

10 Q What is your role and title there?

11 A I am the executive director.

12 Q Can you briefly describe your political experience  
13 before coming to work as the Executive Director of the  
14 Democratic Party of Virginia?

15 A Absolutely.

16 After graduating college I worked several campaigns  
17 in different states. In terms of Virginia, I was the  
18 regional field director in 2008 for the Obama/Warner  
19 campaign. And in 2009 I was, worked in the political  
20 department of both Terry McAuliffe's first race, and then  
21 Senator Deeds' governor race in 2009.

22 Q In those roles did you work at all with the  
23 Democratic Party of Virginia?

24 A I did. In 2008 I worked for what is considered the  
25 coordinated campaign, which worked basically as the

Slutzky - direct

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1 Democratic Party of Virginia. So worked closely on all of  
2 the races.

3 Q All right.

4 As part of your job as executive director have you  
5 had to become familiar with the Democratic Party of  
6 Virginia's plans and strategies in the past to the extent  
7 you were not already familiar with them?

8 A Absolutely. We spent a lot of time, obviously,  
9 reviewing things we have done each year so we can always  
10 improve.

11 Q What is the, I will call it DP/VA if that all right  
12 with you, what is DP/VA's mission?

13 A We had two missions. To get Democrats elected and  
14 keep them in office.

15 Q Can you describe briefly the organizational structure  
16 for the DP/VA?

17 A Absolutely. We have what we consider our local  
18 parties, which is every basic locality, the cities and  
19 counties, across the state. Each have their own, you  
20 know, representation, if you will.

21 We then, from the state-wide level as a steering  
22 committee, a central committee, and then we have the  
23 staff.

24 Q Can you briefly describe what kinds of activities the  
25 DP/VA engages in?

1 A Of course.

2 We do a lot of field training and voter education.

3 We particularly focused on what I would consider both  
4 first persuasion and then turn out. We also work with  
5 current elected to kind of have their back across the  
6 board in anything that they are doing.

7 Q Who do you consider to be a member of the DP/VA?

8 A Anyone who leans Democratic can vote Democratic.

9 Q Is that set forth in one of the DP/VA's governing  
10 documents?

11 A It is laid out in the party plan.

12 THE COURT: Anyone who leans Democratic and votes  
13 Democratic; is that correct?

14 THE WITNESS: Yes, basically anyone who considers  
15 themselves associated with the Democratic Party is a member.

16 THE COURT: Thank you.

17 BY MR. SPIVA:

18 Q Is that definition of membership or constituency set  
19 forth in any governing documents of the DP/VA?

20 A I don't have the exact wording, but it is laid out in  
21 the party plan.

22 Q What if someone only votes for Democrats some of the  
23 time? Do you still consider them a member or a  
24 constituent?

25 A We do. Again, it is anyone who we think might vote

Slutzky - direct

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1 for us is. You know, we are a party of inclusion, so we  
2 want to include them in our efforts and persuade them for  
3 our candidates and turn them out.

4 Q Can you describe the types of groups that DP/VA  
5 considers to be its most reliable voters?

6 A Absolutely. Certainly minority voters, young people,  
7 and to some extent seniors as well.

8 THE COURT: Would you repeat that for me one more  
9 time?

10 A And how --

11 THE WITNESS: Absolutely.

12 THE COURT: Slow down just a little bit so this  
13 gentleman can take it down.

14 THE WITNESS: I apologize.

15 Minority populations, young people, and to some  
16 extent seniors.

17 BY MR. SPIVA:

18 Q How do you come to your understanding of that, who  
19 those reliable Democratic voters are?

20 A I would say it is kind of my business to know that.  
21 We have done, you know, it is the nature of the business.  
22 We know who our -- we know who votes Democrat. We track  
23 it, and analyze it. We track it. Kind of common  
24 knowledge within the industry.

25 Q Let me turn your attention to the recent voter ID

Slutzky - direct

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1 laws. And in particular, the 2013 photo ID law. Do you  
2 have some familiarity with that?

3 A I do.

4 Q Does the DP/VA oppose the 2013 photo ID law?

5 A Yes, we do.

6 Q Why is that?

7 A Because it disenfranchises other voters. It makes it  
8 harder for Democrats to show up and vote.

9 Q How do you know down that?

10 A Because, again, it is kind of common knowledge within  
11 the industry. The specific types of registered voters in  
12 the state that are less likely to have an ID tend to be  
13 more Democratic.

14 Q Have you received any knowledge from people who work  
15 for you within the organization that support that view?

16 A Absolutely. We have a voter protection director on  
17 staff. She is extremely focused on making sure from a  
18 legal perspective everyone has the opportunity to vote,  
19 and she keeps me updated on this sort of thing. She spent  
20 a lot of time talking to me about the ID laws.

21 Q Has DP/VA had to undertake any efforts to overcome  
22 the effects of the 2013 voter law. First focus on past  
23 efforts. I will ask in minute what you are planning to  
24 do, or what you are doing now. But in previous elections  
25 since it has been enforced has the DP/VA had to undertake

Slutzky - direct

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1 any efforts to overcome the effects of the 2013 ID law?

2 A We have had.

3 We have had to dedicate a significant portion of our  
4 both organizer training and our volunteer training to  
5 basically -- historically, in 2008 for example, our focus  
6 was with turn out our voters, and then register and get  
7 them to the polls. Now the extra step is we need to  
8 register our voters, persuade them to vote for our  
9 candidate, and teach them how to vote. So we have had to  
10 do a decent amount of training through kind of all our  
11 different training mechanisms to educate them.

12 On top of that, our local committees have acquired  
13 lists from of likely voters who do not have photo IDs.  
14 And they have culled through, and basically educate them  
15 on the rules with the voter IDs, and they have in some  
16 situations gone out and even transported them, taken them  
17 to the registrar's office and had basically walked them  
18 through all the steps. Any voters we find that doesn't  
19 have ID, we make sure they can vote.

20 Q Have you had to hire anybody in particular as a  
21 result of the 2013 photo ID law?

22 A That was certainly a factor in our decision to have a  
23 voter protection director year round instead of two  
24 months, and now it is now a full time, year round salary.

25 THE COURT: Voter protection director?

Slutzky - direct

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1 THE WITNESS: Voter protection director.

2 BY MR. SPIVA:

3 Q What did the director do? What is her  
4 responsibility, if you can briefly describe that?

5 A Absolutely. She works with the State Board of  
6 Elections. She works with the registrar's office. The  
7 electoral board. She is working on building up those  
8 relationships. She will kind of prepare photo ID  
9 education documents for both local committees. She has  
10 done field training when we have been out there educating  
11 our activists. She will walk them through the steps to  
12 make sure that anyone we have that is recruiting and  
13 training and working with voters is as informed as  
14 possible.

15 Q And not just limiting this to the voter protection  
16 director, but all of the other activities that you have  
17 described a minute ago, does that cost money?

18 A Yes, it does.

19 Q Did that cost time in terms of staff resources?

20 A Yes, it does.

21 Q Did it involve the use of volunteer time?

22 A Absolutely.

23 Q If the 2013 photo ID law had not gone into effect,  
24 would DP/VA have used those resources for something else?

25 A Absolutely.

Slutzky - direct

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1 Q What kind of things would you have done?

2 A We would have used -- we are the Democratic Party.

3 We are going to spend every dollar we can get our hands on  
4 persuading and turning out voters. So every dollar we  
5 raise, we will have, we spend on those efforts. And by  
6 not having to focus a percentage of those -- not saying  
7 there wouldn't be any voter education, but I would say  
8 significantly more education associated with the these ID  
9 laws. And we would have been able to use those resources  
10 on other avenues to get our voters out to vote.

11 Q Does the DP/VA know of people who have been  
12 disenfranchised by the laws, by the photo ID law?

13 A The organization does.

14 Q How do you learn about that?

15 A Obviously this is, again, information that we track.  
16 It is, we also hear about it. And, you know, it is kind  
17 of, again, common knowledge. Every single time we hear  
18 about someone, we do everything we can to remedy the  
19 situation. But, we know we are not catching everybody.

20 Q Does DP/VA know of people who have been burdened by  
21 the photo ID law? Even if they were ultimately able to  
22 cast a vote?

23 A Of course. I would consider those the individuals  
24 that we had to go out and to spend time and energy maybe  
25 going to the registrar's office getting these IDs, you

Slutzky - direct

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1 know. Absolutely.

2 Q For the 2016 general election, what is DP/VA planning  
3 to do to try to overcome barriers presented by the photo  
4 ID law?

5 A We are particularly concerned about 2016 because this  
6 will be the first presidential year that our, that the ID  
7 laws have been in effect. It is pretty well known that  
8 there is a lot of people that only vote every four years.  
9 So this will also be the first time we will be doing  
10 massive voter registration undertaking, given those  
11 factors, there is going to be a significant amount of  
12 individuals that this will be the first time voting with  
13 these new laws in place. So we are going to have to spend  
14 even more time and energy training, focusing on these,  
15 doing greater education. We would love to send out  
16 mailers, and currently we are kind of thinking of  
17 everything we could possibly do. Again, it comes back to  
18 funding.

19 Q Do Democratic voters tend to only vote in, or tend to  
20 be voters who are more likely to vote in presidential  
21 years?

22 A Something we are working on, but yes. If you look at  
23 the historical background, especially in a state like  
24 Virginia, it is kind of known the higher the turnout, the  
25 more likely the Democratic Party is to win. So when less

Slutzky - direct

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1 people vote, it increases the odds. If you can look at  
2 the last two presidential elections compared to state  
3 senate and house races in 2015, those races have lower  
4 turnout and voters tend to lean Republican.

5 Q If the photo ID law were not in place, would you  
6 spend the time, money, and effort that you are either  
7 already spending or planning to spend on the 2016  
8 election?

9 THE COURT: Hasn't she answered that question?

10 MR. SPIVA: I asked about her about past efforts.  
11 Now asking about the 2016.

12 THE COURT: All right. Go ahead.

13 BY MR. SPIVA:

14 Q If the photo ID law were not in place, would you  
15 spend the time, money and effort that you either are  
16 already spending or planning to spend on something else?

17 A We are going to spend every dollar we get. So  
18 absolutely.

19 Q Now, the DP/VA is asking for the photo ID law to be  
20 struck down; isn't that right?

21 A We are.

22 Q If it its struck down, wouldn't that mean that you  
23 would have to engage in further efforts to educate people  
24 about another change in the law?

25 A I would say we likely will, but the time and energy

Slutzky - cross

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1 associated with telling someone, yes, you can vote is very  
2 different than the time and energy of training, you know,  
3 what we have to do now with the laws in place. So some  
4 training, but not nearly the amount that we would.

5 Q Thank you very much.

6 I have no further questions.

7 THE COURT: I am going to recess for lunch.

8 Before you do your cross.

9 I omitted in discussion with the lawyers to put the  
10 name on the record.

11 A Of course. It is Rebecca Slutzky. Last name is  
12 S-L-U-T-Z-K-Y.

13 THE COURT: Thank you very much. We will recess for  
14 one hour. Come back and have cross examination. You are  
15 excused until then, Ms. Slutzky.

16 Stand in recess.

17 (Recess)

18 CROSS EXAMINATION

19 (witness resumed the stand)

20 THE COURT: All right. Continue with the cross  
21 examination of Mrs. Slutzky. Go right ahead.

22 MR. FINBERG: Thank you, Your Honor.

23 BY MR. FINBERG:

24 Q Good afternoon.

25 A Good afternoon.

Slutzky - cross

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1 Q We met before in your deposition. I am Dana Finberg,  
2 one of the attorneys who is representing the Commonwealth  
3 agencies, the defendants in this case.

4 A Good to see you again.

5 Q Good to see you, too.

6 You are executive director of the Democratic Party of  
7 Virginia?

8 A Yes, sir.

9 Q Is it all right if I refer to that as DP/VA?

10 A That is what we do.

11 Q Okay.

12 You held the executive director position since May of  
13 2015?

14 A Correct.

15 Q When did you first come to be employed by the DP/VA?

16 A With this position it was in May. I was a regional  
17 director on the coordinator team in 2008, which I believe  
18 falls directly under the Democratic Party of Virginia.

19 THE COURT: You say since 2008?

20 THE WITNESS: No, no, I was in 2008.

21 THE COURT: So it's a one year-one position?

22 THE WITNESS: It was six months.

23 THE COURT: Six months. Okay.

24 Go right ahead, Mr. Finberg.

25 BY MR. FINBERG:

Slutzky - cross

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1 Q Have you been employed in one capacity or another by  
2 the Democratic Party of Virginia since 2008?

3 A No.

4 Q When did you become employed by the DP/VA?

5 A Again, this stint starting in May of 2015. I was  
6 employed, I believe it was, May to November of 2008.

7 Q Okay.

8 As executive director, you run the day-to-day  
9 operations of the organization?

10 A Correct.

11 Q You are in charge of the staff?

12 A Correct.

13 Q And you held the position of executive director of  
14 the DP/VA when this case was filed in June of 2015, right?

15 A Correct.

16 Q You have a law degree, but don't serve in any  
17 capacity as a lawyer for the DP/VA, is that right?

18 A Correct.

19 Q You are familiar with the party plan of the  
20 Democratic Party of Virginia?

21 A I am.

22 Q Okay.

23 A I couldn't quote it exactly, but --

24 Q You won't have to.

25 Could you put on defendants' exhibit 448, please.

1 Do you recognize this as the Democratic Party plan of  
2 Virginia's as of March 7 of 2015?

3 A I do.

4 Q Okay.

5 Let me ask you to look at section 2.1.

6 A Page?

7 Q Good question. 2.1 is on DX 448006.

8 If you look at section 2.1, and just read that into  
9 the record for us, please.

10 A "Every resident of the Commonwealth of Virginia who  
11 believes in the principals of the Democratic Party is  
12 hereby declared to be a member of the Democratic Party of  
13 Virginia."

14 Q So, if I understand this correctly, the DP/VA  
15 declares people to be members of the Democratic Party of  
16 Virginia if they are Virginia residents and they believe  
17 in the principals of the Democratic Party, is that right?

18 A Correct.

19 Q The Democratic Party of Virginia does not have an  
20 application process for membership, does it?

21 A Correct.

22 Q And the DP/VA does not charge dues for membership?

23 A Mostly correct. There are local committees, and  
24 local committees do pay dues.

25 Q But if you are not a member of the local committee?

Slutzky - cross

1066

1 A Not every member pays dues. Some members -- there  
2 are a dues payment system for some.

3 Q Okay.

4 And the DP/VA doesn't issue membership cards to  
5 members, or otherwise notify residents of Virginia, that  
6 they have been declared to be a member of your  
7 organization?

8 A The party plan which is on here is publicly posted  
9 and referenced, so you could argue that it is public in  
10 that sense.

11 Q I'm not arguing with you. The question is, the DP/VA  
12 doesn't issue membership cards, does it?

13 A We do not.

14 Q You do not otherwise notify directly residents of  
15 Virginia that they have been declared to be a member of  
16 the DP/VA, do you?

17 A I mean, no, we don't call each individual person up  
18 and say, you are a member, if that is what you are getting  
19 at.

20 Q The only way an individual would know that you  
21 consider them to be a member of the party is if they went  
22 to the web site, looked at section 2.1 of the party plan?

23 A No. I think that we are a constituency organization.  
24 I think that members that believe in our -- individuals  
25 that believe in our ideals probably believe that they are

Slutzky - cross

1067

1 members. I think if you were to walk into a random  
2 shopping center and started interviewing people, you would  
3 ask, are you a Democrat? Plenty of people would say yes.  
4 And I would take that assertion of yes as being a member  
5 of our organization. I don't think they need a membership  
6 card to be able to safely answer that question.

7 Q The Democratic Party of Virginia doesn't maintain a  
8 list of members, does it?

9 A There is not -- in Virginia you don't register with a  
10 party affiliation. So, we do track individuals. I mean,  
11 we know who our members are. I would say we don't  
12 necessarily with a hundred percent accuracy have the name  
13 of every single person that -- I think we -- so, yes, yes.  
14 Did that answer it?

15 Q It is pretty much a pretty simple yes or no question.  
16 Does the DP/VA maintain a list of current members?

17 A We have lists of individuals that we target for  
18 elections, but it is not a hundred percent inclusive every  
19 single person would be on that list.

20 Q Do you recall when I took your deposition?

21 A Yes.

22 Q Do you recall when I asked you about whether or not  
23 the DP/VA maintained a membership list? You testified  
24 that it would be an extremely burdensome process to  
25 produce such a list?

1 A Yes.

2 Q Do you agree with that testimony that you previously  
3 gave?

4 A I definitely do.

5 Q The membership of the DP/VA as the DP/VA defines its  
6 membership includes people that might vote for Republican  
7 or third party candidates from time to time; isn't that  
8 right?

9 A Again, I think it is if you generally go with the  
10 democratic ideals you are a member. Obviously, there is,  
11 you know, somebody might chose to support a candidate, but  
12 that doesn't mean they are no longer a member forever.

13 Q So, does the membership of the DP/VA as the DP/VA  
14 defines its membership include people that might vote  
15 Republican or third party candidates from time to time?

16 A I think they could.

17 Q Are there members of the DP/VA who support the photo  
18 ID law that the DP/VA is trying to invalidate in this  
19 case?

20 A Could you repeat the question?

21 Q Are there members of the DP/VA as you defined  
22 membership who support the photo ID law that the DP/VA is  
23 trying to invalidate in this case?

24 A I don't know that I could speak for the millions of  
25 individuals, but I would say across the board the

Slutzky - cross

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1 Democratic Party does not support this voter ID law. I  
2 can't say it is not plausible there could be one exception  
3 out there, but generally speaking.

4 Q Has the DP/VA ever polled its membership to determine  
5 whether there is support among the Virginia residents that  
6 the DP/VA has declared to be its members for the  
7 invalidation of this law?

8 A To my knowledge, we have not run a specific poll.  
9 That being said, I think we certainly regularly converse  
10 with our members, and from conversations myself and other  
11 party members have had, there is general understanding  
12 that everybody is opposed.

13 Q Everybody is opposed.

14 A I personally have never heard of a situation where  
15 somebody supported the law --

16 Q Are you aware --

17 A -- unilaterally. But I am not aware of anyone.

18 Q Are you aware of Democratic delegates to the Virginia  
19 legislature who have polled their constituency and found  
20 that a majority of the constituency support the voter ID  
21 law in this case?

22 A I was not aware of that.

23 Q Did the membership of the DP/VA get to vote on  
24 whether this law suit should get filed?

25 A No.

Slutzky - cross

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1 Q You testified on direct exam that the DP/VA serves  
2 essentially two roles, is that right?

3 A Yes.

4 Q Is that to get Democrats elected to office?

5 A Yes.

6 Q And to support Democrats once they are in office?

7 A Correct.

8 Q Is one of the purposes of the DP/VA to litigate on  
9 behalf of its members?

10 A I think when there is litigation that affects the  
11 party membership, the party membership in the way that  
12 this legislation does, that it is important for us to step  
13 in and take on that role.

14 Q Can you show me where in the Democratic Party plan it  
15 says anything about litigating on behalf of the Party?

16 A To my knowledge it is not in there.

17 Q In fact, neither the steering committee nor the  
18 central committee of the Democratic Party of Virginia  
19 authorized the filing of this law suit, did they?

20 A There was not a formal vote; however, the steering  
21 committee did vote to elect both our party chairwoman, and  
22 they voted on me when I first took office to be  
23 responsible for these types of decisions. And we have  
24 kept them apprized of the details of this litigation on  
25 all of our meetings since then. They Have been kept

Slutzky - cross

1071

1 updated throughout. But not a formal vote.

2 Q Did the DP/VA itself finance this litigation?

3 A They are not.

4 Q The Democratic Party of Virginia has not itself  
5 performed any studies or surveys to quantify whether the  
6 voter ID statute has disproportionately reduced voter  
7 turnout to Democratic parties in Virginia; is that right?

8 A A scientific study, no. But again, I would say it is  
9 the nature of what we do that we understand the effects,  
10 and we see it through casual conversations and feedback  
11 and the way our party works.

12 Q I think you have testified on direct that you had  
13 attempted to reach out to "disenfranchised" voters?

14 A I personally have not, but individuals in the  
15 organization absolutely.

16 Q The Party has?

17 A The Party has, yes.

18 Q I think you testified on direct that the DP/VA has  
19 gotten in contact with voters who could potentially lack  
20 valid photo IDs; that is right?

21 A Yes, they have.

22 Q How did the DP/VA come to know the identity of those  
23 voters, who to contact?

24 A The Democratic Party knows who are registered voters  
25 in the State of Virginia. And we generally know,

Slutzky - cross

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1 obviously we have the ability to identify voters who are  
2 likely Democrats. And that list was compared to the DMV  
3 listing, and my understanding is anyone who didn't have a  
4 driver's license was put on a reach out to list.

5 Q As a matter of fact, to assist the DP/VA in its  
6 outreach efforts the DP/VA got information from the  
7 Department of Elections, didn't it?

8 A At the moment I am not positive.

9 Q Do you understand that the DP/VA reached out to the  
10 State Board of Elections, or the Department of Elections  
11 to request information to allow them to conduct outreach  
12 efforts?

13 A I know that we are regularly in touch with the  
14 Department of Elections. I personally have not had a  
15 direct conversation with them on that. I think I would  
16 assume individuals from the Party have. I just can't say  
17 with certainty.

18 Q The Democratic Party of Virginia contends that it has  
19 had to divert resources as a consequence of the enactment  
20 of the voter ID law, right?

21 A Um hum.

22 Q And that it has had to spend time and energy,  
23 resources, educating voters on the requirements of the  
24 law?

25 A Correct.

Slutzky - cross

1073

1 Q And you say that this time and effort would have been  
2 spent on growing, enhancing voter outreach and  
3 registration?

4 A Correct.

5 Q And persuasion?

6 A Yes. Communicating with our voters with other goals  
7 in mind, other than educating them on how to vote.

8 Q Okay.

9 At least in terms of the monetary cost, it is hard to  
10 quantify that, right?

11 A Correct.

12 Q As part of that did the DP/VA develop media that it  
13 can give to folks describing the requirements of the voter  
14 ID law?

15 A We have talked in 2016 about doing direct mailings  
16 with voter education based on the voter ID lays. To my  
17 knowledge we have -- it is pretty significant monetary  
18 amount to do those type of direct mailings. To my  
19 knowledge I don't believe we have in the past, but that is  
20 a thing we would like to do this year.

21 Q Between the enactment of the voter ID law and now  
22 DP/VA hasn't yet expended the resources to do that?

23 A We at the state party haven't done a massive direct  
24 mail piece across the state, no. Have our local  
25 committees done any sort of, you know, written

Slutzky - cross

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1 information? I would certainly assume so. I can't speak  
2 directly on, you know, a flyer or anything that I have  
3 seen. But that would certainly fall in line with the text  
4 of outreach we have done, and our voter protection  
5 director certainly created materials and training. And,  
6 you know, I can't say -- I can't give you a specific  
7 example of the direct mail piece, but the likelihood that  
8 there has been some sort of written material sent out to  
9 some segment of the population I would say is reasonable.  
10 I just don't know specifically.

11 Q So, in terms of quantifying the amount of time that  
12 has been spent since the enactment of the voter ID law and  
13 now developing written materials that can be handed to  
14 voters to educate them about the requirements of the voter  
15 ID law, you don't believe that much has been done yet?

16 A I believe there has been some done. I know our voter  
17 protection director who works with our field director, so,  
18 again, I don't know if they have created a piece that  
19 might have gone out in the walk packets when they were  
20 knocking on doors last year. I can't speak personally to  
21 that. But that would certainly go in line with the types  
22 of work that they have been doing. So --

23 Q Ms Slutzky, you are aware that the Virginia law  
24 requiring acceptable voter IDs changed in 2012, right?

25 A Correct.

Slutzky - cross

1075

1 Q And in connection with the change of law that  
2 occurred in 2012, did the Democratic Party of Virginia  
3 divert time, energy and resources to educate voters  
4 regarding what those new requirements were?

5 A My understanding is yes.

6 Q Yet the Democratic Party of Virginia didn't sue to  
7 try to invalidate that law, did it?

8 A I don't know what specific activities they might have  
9 done in 2012. I know that it increased more dramatically  
10 after 2013. So I think as the laws have gotten stricter  
11 so has our training and the resources that we have had to  
12 effectively educate voters.

13 Q After the 2012 law was enacted changing the voter ID  
14 requirements did they DP/VA sue to try to invalidate that  
15 law?

16 A We did not sue in 2012 to my knowledge.

17 Q And the DP/VA was conducting voter outreach long  
18 prior to the enactment of the voter ID law, wasn't it?

19 A Correct.

20 Q And it has always been a part of the mission of the  
21 Democratic Party of Virginia to engage in voter outreach  
22 and voter registration efforts?

23 A Absolutely.

24 Q And to some extent those voter outreach and voter  
25 registration efforts have always involved an educational

Slutzky - cross

1076

1 component, haven't they?

2 A Yes.

3 However, for example in 2008 we spent a very minimal  
4 amount of time doing education on how someone can vote  
5 compared to this past year in 2015. I would say, as an  
6 example, I would like to use the Iowa caucuses. In Iowa,  
7 your know, there is videos out there on, you know, how  
8 caucusing is easy and there is a lot of time and energy of  
9 what that process looks like because it is more elaborate  
10 and complicated. I would say now that we are in 2015 and  
11 2016 we are having to take on more of those types of  
12 activities than we did in previous years.

13 Q You testified on direct exam about the hiring of, I  
14 think, her name is Ms Georgina -- how do you pronounce her  
15 last name?

16 A Cannan.

17 Q Is that C-A-N-N-A-N?

18 A I believe so.

19 Q Okay.

20 So, you testified on direct about the hiring of Ms  
21 Cannan.

22 A Yes.

23 Q There is a voter protection director for the  
24 elections in 2012 prior to the enactment of the statute,  
25 right?

Slutzky - cross

1077

1 A In past years we have, the Democratic Party has hired  
2 either, you know, either the Party or the campaigns have  
3 hired someone to do voter protection. But usually a short  
4 term position that gets hired in roughly September to  
5 November. Georgina has been that person in I believe '13  
6 and '14, but not '12. I will double check her resume to  
7 confirm that, who it was in '12.

8 Q But there was someone in 2012.

9 A I would a assume so.

10 Q So there has been somebody in 2012, somebody in 2013,  
11 and now in 2014?

12 A Yes. But, again, these efforts have been very  
13 specifically related to those campaigns, and it is a very  
14 different role, kind of basically having poll watchers and  
15 the types of activities the voter protection director  
16 would have done in previous cycles compared to it being a  
17 year-round salaried possession. You know. There is a lot  
18 more you can do in 12 months than in two months. So to  
19 that extent the program has changed dramatically.

20 Q But you would agree with me, wouldn't you, that her  
21 full time hiring was only brought about in part as a  
22 result of the enactment of the voter ID law?

23 A Yes. I don't think it was a hundred percent.

24 Q It was not the only reason she was hired.

25 A Yes, yes. Certainly it was a significant reason.

Lichtman - direct

1078

1 Q Not the only reason?

2 A Not the only reason.

3 Q Your Honor, no further questions.

4 THE COURT: All right. Thank you, sir.

5 Any redirect?

6 MR. SPIVA: No redirect, Your Honor.

7 THE COURT: All right. Very well.

8 Thank you. You are free to go. Thank you very much  
9 for coming. We appreciate your testimony.

10 THE WITNESS: Thank you, very much. Appreciate it.

11 (Witness stood aside)

12 Lichtman - direct.

13 MR. SPIVA: Our next witness will be Dr. Allan  
14 Lichtman.

15 THE COURT: Dr. Allan Lichtman. Okay.

16 Raise your right hand sir, place your left hand on  
17 the Bible, and face the clerk of the court:

18 ALLAN LICHTMAN

19 WAS SWORN AND TESTIFIED AS FOLLOWS:

20 DIRECT EXAMINATION

21 THE WITNESS: I have a personal issue.

22 THE COURT: Yes, sir.

23 THE WITNESS: I have a medical issue, prostate cancer  
24 survivor, and I may get hit unpredictably.

25 THE COURT: Sure. All you do is raise your hand.

Lichtman - direct

1079

1 That will be my signal to call a recess. Okay?

2 THE WITNESS: Thank you, sir. It may be no issue. I  
3 hope.

4 THE COURT: We will accommodate you. Glad to do it.

5 THE WITNESS: Thank you, sir.

6 DIRECT EXAMINATION

7 THE COURT: If you would identify yourself with your  
8 full name and spell the last name for the court reporter  
9 so we make sure we get it right.

10 THE WITNESS: Happy to do it. It is Allan J.  
11 Lichtman. L-I-C-H-T-M-A-N.

12 Is there water up here?

13 THE COURT: Yes, sir, we have water.

14 You may want to spell the first name since --

15 THE WITNESS: Yes. It is A-L-L-A-N, Your Honor.  
16 A. L. L. A. N.

17 THE COURT: Thank you.

18 THE WITNESS: Thank you.

19 BY MR. SPIVA:

20 Q Good afternoon. Where are you employed?

21 A I am employed at American University.

22 I actually sometimes hate to admit it, but I have  
23 been employed there for 43 years. Since 1973. My one and  
24 only adult job.

25 Q What is your job there?

Lichtman - direct

1080

1 A I am a distinguished professor of history.

2 Q What is a distinguished professor of history?

3 A Not something I made up. It's not a department  
4 title. It is a university title, the highest academic  
5 rank in the university above professor. Only three or  
6 four of us out of 850 at the university.

7 THE COURT: All right.

8 BY MR. SPIVA:

9 Q Can you describe your educational background,  
10 Dr. Lichtman?

11 A BA from Brandeis in 1967.

12 Spent three years as a biology major, saw the light  
13 and switched to history my senior year. So science and  
14 math background. And then a PhD from Harvard University  
15 in 1973 with a specialty in American political history and  
16 the quantitative or mathematical analysis of social  
17 science information.

18 Q Can you describe what areas you published in that are  
19 relevant to this litigation?

20 A Yes. I would say there are three relevant areas.

21 The first one is quantitative and historical  
22 methodology. This goes back to the late 1970s when I  
23 published a book in the sage series on the quantitative  
24 applications in the social sciences called Ecological  
25 Inference. Nothing to do with the environment, but had to

1 do with mathematical methods for drawing inferences from  
2 data for political units, like wards or precincts. I have  
3 also published quantitative methodological articles in  
4 such journals as Social Science History, Journal of  
5 Interdisciplinary History, Political Methodology, and  
6 Journal of the United States National Academy of Sciences.

7 I have also co-authored a book on historical methods  
8 called Historians and the Living Past. The theory and  
9 practice of historical study. And I have taught both  
10 quantitative and historical methodology as well as written  
11 about them.

12 The second area would be the application of  
13 quantitative and historical methods and research to the  
14 study of American political history and current American  
15 politics.

16 This approach grounds many of my books, including,  
17 again, going back to the late 1970s, Historians and the  
18 Living Past -- excuse me -- Prejudice and Geo Politics,  
19 the Presidential Election of 1928, and more recently my  
20 series of books on the Keys to the White House, sixth  
21 edition is about to come out, predicting who is going to  
22 win in 2016. As well as books such as White Protestant  
23 Nation, as well as the Rise of American Conservative  
24 Movement. And my most recent book, F.D.R. and the Jews.  
25 I have also published articles on these topics in journals

1 such as the American Historical Review, the Journal of  
2 Social History, International Journal of Forecasting, The  
3 International Journal of Information Systems, and others.

4 THE COURT: Is there any challenge to the Doctor's  
5 credentials?

6 MR. HEARNE: No, Your Honor.

7 THE COURT: He will be received as an expert witness.  
8 Go right ahead.

9 BY MR. SPIVA:

10 Q Thank you, Your Honor.

11 Have you published or had expertise in the  
12 application of social science methodology in voting rights  
13 and redistricting issues?

14 A Yes. In many different contexts. Very quickly, I  
15 have published articles in the Journal of Legal Studies,  
16 Evaluation Review, the Journal of Law and Politics, and  
17 others on that topic.

18 Q Have you previously served as an expert in other  
19 voting rights cases?

20 A Yes, I have.

21 Q How many? Approximately, how many times?

22 A I haven't counted, but I would say more than 80  
23 voting rights cases of various types since the 1980s.

24 Q Have you worked on behalf of plaintiffs and  
25 defendants?

Lichtman - direct

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1 A I worked for plaintiff and defendants. I have worked  
2 for independent commissions. I have worked for state and  
3 local jurisdictions. I have worked for the U.S.  
4 Department of Justice. I have worked for civil rights  
5 groups. I have worked for private plaintiffs. I have  
6 worked for Republican and Democratic interests insofar as  
7 they can be defined in various cases.

8 THE COURT: Okay. Next question.

9 BY MR. SPIVA:

10 Q Can you describe some of the work for Republican  
11 interests?

12 A Yes. In 1990 I was an expert for the Massachusetts  
13 Republican redistricting task force. I also was working  
14 in concert with Republican interests in the famous  
15 DeGrandy case in Florida that went to the Supreme Court,  
16 sitting with Benjamin Ginsberg, the head of the Republican  
17 redistricting task force.

18 And the longest job I ever did as a consultant was  
19 for the then Republican mayors Giuliani and Bloomberg in  
20 New York City. I was their voting rights adviser in their  
21 effort to create non-partisan elections. Quite a thing  
22 for New York City. And a lot of opposition, of course,  
23 was the Democratic Party that controlled City politics.

24 Q Had you previously testify on the issue of intent in  
25 legislative enactment?

Lichtman - direct

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1 A Yes, I have. I think about four times, both in voter  
2 ID cases, redistricting cases, and in North Carolina, a  
3 case that combined voter ID with a number of other issues.  
4 And way back in the '80s in the landmark Garza case. I  
5 wasn't directly testifying on intent, but my testimony  
6 bore on that.

7 Q Have you been accepted by courts as an expert on  
8 intent?

9 A Yes. In four, all four cases in which I directly  
10 testified on that.

11 Q Please tell us in a summary fashion to begin with  
12 what issues you were asked to address as an expert witness  
13 in this case.

14 A Yes. I was asked primarily to address the issue of  
15 whether the voter identification law, SB 1256 in 2013, was  
16 adopted and implemented by the Commonwealth of Virginia  
17 with the intent to discriminate against African-American  
18 voters and would-be voters by placing disparate burdens  
19 upon this minority group when it came to voting  
20 opportunities relative to whites.

21 I would also say, while I mention adopted and  
22 implemented, I didn't just mean to quickly pass over  
23 implemented. That is a very important element here  
24 because, as they say, the devil is in the details.

25 THE COURT: You are going -- you just answer the

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1 questions he asks, okay? I know you have a lot to say, I  
2 respect you very much, but please answer the questions  
3 counsel gives you. Okay?

4 Go ahead.

5 THE WITNESS: And I was also asked to look at the  
6 so-called Senate factors that were part of the totality of  
7 circumstances, and to respond to any testimony, reports,  
8 analysis --

9 THE COURT: All right.

10 THE WITNESS: -- by defendants' expert.

11 THE COURT: Go ahead.

12 BY MR. SPIVA:

13 Q What information did you rely on in conducting your  
14 analysis, Dr. Lichtman?

15 A I relied on the kind of standard information that  
16 historians and political analysts rely on. Data from the  
17 Virginia Department of Elections data base. Scholarly  
18 books, articles, reports, newspaper, journalistic  
19 articles, demographics, socioeconomic information,  
20 election returns, e-mails, court opinions, briefs,  
21 government and organizational reports, academic studies  
22 and scientific surveys.

23 Q What methodology did you follow in your analysis?

24 A I relied on my standard methodology that I have used  
25 in numerous historical studies which is consistent with

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1 the methodological guidelines by the U. S. Supreme Court  
2 in the Arlington Heights case where the court focused on a  
3 number of issues, discriminatory history, discriminatory  
4 impact, sequence of events, procedural or substandard  
5 deviations, and contemporary statements.

6 Q Did you attempt to a draw legal conclusion in your  
7 work?

8 A I did not. I simply drew substantive conclusions as  
9 I would in any voting rights case.

10 Q How did your work differ from conclusions that the  
11 Court could reach for itself?

12 A Well, I would certainly expect the Court to assess  
13 and evaluate my work and compare it to the work of  
14 defendants' experts, and one of the defendants' experts,  
15 Dr. Owen, engaged the issue of intent, drew her own  
16 findings about intent, but I would not expect the Court to  
17 do the research, the analysis, and the writing that goes  
18 into my reports and testimony. I presented more than 35  
19 statistical charts and tables in my report.

20 I analyzed a wide range of primary source materials  
21 ranging from e-mails to legislative debates. I  
22 scrutinized scientific surveys, academic studies, reports,  
23 and election returns and put it together in a narrative  
24 for the Court to weigh and assess and draw legal  
25 conclusions from.

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1 Q Have you analyzed issues of intent in your scholarly  
2 work?

3 A Oh, numerous times. You would have to shut down  
4 historical scholarship if you shut down analysis of  
5 intent. This includes, of course, my two recent books on  
6 the Rise of the American Conservative Movement, and F.D.R.,  
7 both of which won major national awards.

8 Q Can you briefly summarize your overall findings in  
9 this case?

10 A Yes. To do it really quickly. My analysis of  
11 historical and quantitative evidence indicates that both  
12 the enactment of SB 1256 and the interpretation of SB 1256  
13 the following year, indicate discriminatory intent in both  
14 the adoption and the implementation of this law.

15 In addition, I found that, I think, eight of nine of  
16 the Senate Factors that we are guided to look at by the  
17 courts apply here in the Commonwealth of Virginia.

18 Q Did any of the reports submitted by experts for the  
19 defendants cause you to question any of these findings?

20 A They did not.

21 Q I would like to now turn to detailed analysis. Did  
22 you find that there is a history of discrimination against  
23 African-Americans in Virginia?

24 A I did.

25 MR. HEARNE: Your Honor, it appears the witness is

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1 reading from prepared remarks. And if they are exhibits  
2 or his report, then that would be fine, but if it could be  
3 identified. That being said, he appears to be reading  
4 something in the record. If it is something we have not  
5 been provided, I would like to be provided that.

6 MR. SPIVA: These are his own --

7 THE WITNESS: Sorry.

8 THE COURT: It may be. But I think he ought to set  
9 them aside and testify from his own knowledge. If he  
10 needs to refresh his recollection, I am sure you can do  
11 that.

12 MR. SPIVA: Sure. Yes. These are his own notes.

13 THE WITNESS: Just my notes, excerpts from my  
14 reports. As you can see, I am not reading.

15 THE COURT: If you need to refresh your recollection,  
16 you can do so, but you need to testify independently.

17 Go ahead.

18 BY MR. SPIVA:

19 Q And what were your findings with respect to the  
20 history? First of all, have you done something separate  
21 and apart from what Dr. Smith has already provided to the  
22 Court?

23 A Dr. Smith, of course, did a lot of historical work.  
24 What I provided in my supplemental report on pages 40 and  
25 41 was some recent examples that go along with the longer

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1 history of racial discrimination. I am not going to read  
2 them all, but will briefly summarize them. They had to do  
3 with many years of pushing for restrictive voter ID laws.  
4 They had to do with court findings that the post 2010  
5 congressional redistricting plan violated the Constitution  
6 because of a racial gerrymandering in congressional  
7 districting. That was reaffirmed after the Alabama  
8 decision came down from the Supreme Court. I was an  
9 expert witness in that Alabama case, so I am very familiar  
10 with it. And also pointed out that recently, as well,  
11 Republican members of Congress from Virginia have not been  
12 supportive of efforts to restore the pre-clearance  
13 provisions of the Voting Rights Act in a way that comports  
14 with the United States Supreme Court striking down of the  
15 formula for section V of the Voting Rights Act.

16 Q Does Virginia history of racial discrimination have a  
17 present-day manifestation from a socioeconomic standing of  
18 African-Americans and whites?

19 A Yes, it does. I have done extensive socioeconomic  
20 analysis of factors that are standard in gauging such  
21 things, and factors that bear directly upon voting and  
22 upon voter ID laws, Your Honor.

23 Q Are these disparities quantified in tables one  
24 through four and charts one through eight --

25 A That is correct.

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1 Q -- of the expert report?

2 A Yes.

3 Q If we could turn to your initial report, which is  
4 Plaintiffs' Exhibit 215. All the expert reports, as I  
5 understand it, Your Honor, have been received in evidence.

6 THE COURT: What was the number again?

7 MR. SPIVA: Sorry. I misspoke. I gave you the  
8 rebuttal report number. It is actually Plaintiffs'  
9 Exhibit 212.

10 THE COURT: 212. That will be received without  
11 objection.

12 MR. FINBERG: Yes, Your Honor.

13 THE COURT: It will be received.

14 (PX- 212 was offered and  
15 received in evidence)

16 BY MR. SPIVA:

17 Q If we could turn -- first of all, Dr. Lichtman, take  
18 a quick -- you have the hard copy up there, do you need --

19 A I think I have a hard copy, and I see what is on the  
20 screen.

21 Q Okay.

22 Does that appear to be your initial report in the  
23 case?

24 A Yes.

25 Q Let me ask you to turn on the screen to table one,

1 which is on page seven of your initial report.

2 A Yes, I see it.

3 Q Actually got the wrong page. It is page six.

4 So, can you explain your findings as set forth in  
5 table one?

6 A Certainly. A lot of findings there, but let me begin  
7 by indicating this comes from the American Community  
8 Survey, official survey by the U.S. Census for 2009 to  
9 2011. And the reason, Your Honor, I use that particular  
10 survey was it was information available at the time of the  
11 adoption of SB 1256 rather than information that was  
12 produced later.

13 This looks at standard economic measures including  
14 median household income, per capita income, poverty rates,  
15 unemployment, and asset poverty.

16 Asset poverty is probably the only one that is a  
17 little odd, but as I indicate in the footnote there, it is  
18 the lack of sufficient net worth to subsist at the poverty  
19 level for three months without access to income. In other  
20 words, we often focus on income, but assets are very  
21 important as well because they are a cushion if you lose  
22 your income.

23 All of these measures, I'm not going to go through  
24 them individually, but they all show essentially the same  
25 picture; that is, African-Americans have much lower income

1 than whites. They are far more likely to be in poverty,  
2 poverty rate is more than double. They are far more  
3 likely to be unemployed. The unemployment rate is about  
4 double. And they are far more likely to be in asset  
5 poverty. Asset rate is about triple.

6 Q Turning to chart one on page 67. Can you briefly  
7 describe what that -- what you are conveying with that  
8 chart?

9 A That just puts it in graphic form. People are often,  
10 you know -- I find this a lot in my teaching -- a little  
11 phased by tables with numbers. And this is the same  
12 information in pictorial form that just shows how large  
13 the gap is in this case on income levels between  
14 African-Americans and whites in Virginia.

15 Q In chart two on page eight, is that the asset poverty  
16 rate, unemployment rate shown?

17 A It is actually three things.

18 Q Okay.

19 A I couldn't put it on the other chart because the  
20 other chart was in dollars. This is in percentages. And  
21 this, again, for poverty, unemployment, and asset poverty  
22 graphically shows how large the gap is in Virginia between  
23 African-Americans and whites.

24 Q Turn to table two on page nine, and explain what that  
25 shows.

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1 A Yes. This is education measures. Very important in  
2 dealing with voting and voters IDs. It shows most blacks  
3 and whites are high school graduates, as we might expect  
4 in Virginia, but that there is still a considerable gap  
5 between blacks and whites when it comes to college degrees  
6 or more, there is a very large gap between blacks and  
7 whites in Virginia. About double.

8 And when it comes to scores, this is just indicative  
9 of those below a basic math capacity. It is almost triple  
10 for eighth grade African-Americans as opposed to whites.  
11 And the drop-out rate from nine to 12 is slightly more  
12 than double. For African-Americans than whites. So there  
13 are pretty severe educational barriers being faced by  
14 African-Americans, unfortunately, in the Commonwealth of  
15 Virginia versus whites.

16 Q Chart three on page ten. Is that just a graphic  
17 representation of what you were just talking about?

18 A It is a graphic representation of part of it. It is  
19 that part that deals with percentages. It shows  
20 African-Americans are slightly lower, but not dramatically  
21 so for high school graduates, but dramatically lower when  
22 it comes to college degrees or more.

23 Q And what is chart four on page eleven showing?

24 A Well, it just shows the percentages below basic math  
25 and the drop-out rate, showing that the African-American

1 percentage lacking basic math at the eighth grade is  
2 nearly triple that of whites. And the drop-out rate,  
3 those who don't get out of high school, is slightly more  
4 than double for African-Americans than whites.

5 Q In table three on page 12, can you explain what this  
6 conveys?

7 A Yes. Now we are getting into another area covered by  
8 the census, and that is housing measures. Kind of got a  
9 separate census of housing and population.

10 I am looking at a few things here. The  
11 owner-occupied housing, that is, what percentage of blacks  
12 and whites own as opposed to rent? And you can see it's,  
13 about 50 percent higher for whites. Median home value is  
14 substantially higher for whites. And I would like to  
15 highlight the next one because I think it is particularly  
16 pertinent to our analysis of voting and our analysis of  
17 voter ID laws in the Commonwealth. And that is percent of  
18 households with no vehicle available. And it is nearly  
19 triple for African-Americans as compared to whites.

20 And percent with no telephone service, it is small  
21 for both, but it is about twice as high for  
22 African-Americans as compared to whites.

23 Q What about chart five on page 13?

24 A That looks at the home value. Showing, you know,  
25 that the home value of whites is substantially higher for

1 its median, that is the midpoint, as compared to  
2 African-Americans.

3 Q How about chart six on that same page?

4 A Yes. Chart six looks at those other measures, home  
5 ownership, about 50 percent higher. Lack of vehicle in  
6 the household, almost triple. And the lack of telephone  
7 in the household, about double.

8 Q In table four on page 14, what is that representing?

9 A This looks at some basic health measures. And first  
10 it looks at those who don't have health insurance. Nearly  
11 double for African-Americans as compared to whites.

12 The life expectancy of African-Americans is a bit  
13 lower than that for whites, although births are about  
14 twice as high, nearly, for African-Americans than whites.  
15 And the infant death rate per one thousand births is more  
16 than double.

17 So you have got other burdens on African-Americans  
18 relative to whites in the Commonwealth with respect to  
19 availability of health insurance -- big issue these  
20 days -- as well as other health measures.

21 Q Just the last two for now. I think that they are  
22 just representations in graphic form, but look at chart  
23 seven and chart eight. If there is something to add, that  
24 is fine?

25 A No. It is representation in graphic form if you

1 actually want to see the picture.

2 Q Okay.

3 A And the same thing for chart eight on the other  
4 health measures. Again, just showing it in graphic as  
5 opposed to having, trying to manipulate numbers in your  
6 head.

7 Q Did those tables and charts relate to the Senate  
8 Factors at all, Dr. Lichtman?

9 A I think they relate to two things. As I said, they  
10 relate to voter ID, and voting, and clearly this is one of  
11 the Senate Factors that is posed for us to analyze. It's  
12 lingering effects of discrimination in terms of  
13 disparities on these kinds of socioeconomic measures.

14 Q Did you next consider the sequence of events leading  
15 to the adoption of SB 1256?

16 A I did.

17 Q What did you consider first?

18 A Well, what I first considered in terms of the  
19 sequence of events was the history, at least recent  
20 history, of voter ID laws in the State of Virginia. And  
21 before that, even in the bigger context, I also considered  
22 the underlying politics of it.

23 In terms of voter turnout, and in terms of partisan  
24 politics in voting. That is the bigger context of the  
25 specific sequence of voter ID laws.

1 Q What was the first sequence of political events that  
2 you analyzed?

3 A The first sequence of political events that I  
4 analyzed is in my, report -- I believe starts on page  
5 18 -- and that is the patterns of voter turnout by race  
6 and ethnicity from about 2004, 2006 to the present.  
7 Turnout is part of the life blood of politics. The two  
8 fundamental elements of electoral politics are getting  
9 people to vote for you, and getting the kind of people who  
10 vote for you to turnout to vote.

11 Q Is this represented in table five of your report?

12 A That is correct.

13 Q What does table five show?

14 A Table five shows several things.

15 First of all, if you look at the U.S. Senate  
16 elections, table five shows that there has been a steep  
17 decline in white turnout relative to minority turnout in  
18 the Commonwealth since 2006. Let me explain these turnout  
19 numbers.

20 These turnout numbers are not the rate at which the  
21 various groups turn out. There is something much more  
22 important. They are the life blood of politics, and that  
23 is, of the entire electorate who shows up in these  
24 elections, what percentage of the electorate is white,  
25 what percentage of the electorate is black, what

1 percentage is Hispanic, and others. And this is taken  
2 from exit polling, a very standard source for looking at  
3 turnout and does.

4 First, if we compare U.S. Senate to U.S. Senate  
5 elections we can see that back in 2006 the white share of  
6 the U.S. Senate electorate was 78 percent. That went down  
7 to 70 percent in the 2012 U.S. Senate election, which may  
8 not be entirely comparable, of course, because 2006 is a  
9 mid-term election year and 2012, of course, is a  
10 presidential election year when you might expect more  
11 minorities to show up. However, we can fast forward to  
12 2014, the most competitive Senate election in the country,  
13 and white turnout remains constant at 70 percent, and the  
14 other numbers are roughly the same.

15 We can see black turnout rises from 16 percent back  
16 in 2006 to 20 and 19 percent, essentially, with rounding  
17 errors in 2012 and 2014. And we can see, not surprisingly  
18 in the Commonwealth, as elsewhere, the most rapidly rising  
19 component of the turnout is Hispanic.

20 So over time in U.S. Senate elections we have three  
21 patterns. Smartly falling white turnout as a component of  
22 the electorate, rising black turnout as a component of the  
23 electorate, and rising Hispanic turnout as a component of  
24 the electorate.

25 The next element of the table, which should be

1 separately examined, is gubernatorial elections. In the  
2 Commonwealth, of course, gubernatorial elections are not  
3 entirely unique, but a little unusual in that they are  
4 held on the off year. We can see from the off year of  
5 2009 to the off year of 2013 a similar pattern of  
6 declining white and rising minority turnout.

7 The white component of the electorate drops. That is  
8 from 78 percent to 72 percent. The black component rises  
9 from 16 to 20. We don't have for 2009 the other groups  
10 parsed out, but by simple subtraction you can see the  
11 other groups would be slightly rising as well.

12 And, of course, as you get into these lower white  
13 turnout elections, like 2012 and 2013, 2014, you see  
14 Democratic victories.

15 Q What does table six show on the next page related to  
16 the patterns of turnout for whites and minorities?

17 A Table six does the same thing for presidential  
18 elections. And we see a similar, although not quite as  
19 stark a pattern in presidential elections, because even  
20 going back to 2004 there is a pretty robust minority  
21 participation in presidential elections. Minorities tend  
22 to turn out more robustly in presidential elections  
23 relative to whites than in mid turn elections or in off  
24 year elections.

25 So we can see the decline, more modest, but it is

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1 there. 2004 whites comprise 72 percent of the electorate.  
2 In 2012, 20 percent. Excuse me. 70 percent in both 2008  
3 and 2012. And not a whole lot of change in the black  
4 component. And, again, a rise in the Hispanic component.

5 So, similar, but not as sharp a pattern for  
6 presidential elections.

7 Q Did you analyze the political implication of these  
8 turnout changes?

9 A Yes, I did.

10 Q How did you do that?

11 A I used exit polls again, Your Honor, because exit  
12 polls not only gage turnout, they also gauge how various  
13 groups in the electorate -- but not just racial groups --  
14 but age groups, income groups, education groups, a  
15 standard tool in political history and political science.

16 Q Can you turn to Table 7, please.

17 Would you look at Table 7 in Chart 9 up at the same  
18 time, Dr. Lichtman? We can put them both on the screen.

19 THE COURT: Let me ask you a question.

20 THE WITNESS: Certainly.

21 THE COURT: In determining these various percentages,  
22 your exit polls, did you do an exit poll at every voting  
23 precinct, or did you just take a sample and extrapolate  
24 from that?

25 THE WITNESS: I didn't do the exit polling. The

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1 polling is done in every year by a single group that is  
2 independent of everybody. It is called Edison Research.  
3 And they are obviously not going to be at every single  
4 polling place. They are going to be at a representative  
5 sampling of polling places.

6 THE COURT: Fine. Thank you, Doctor.

7 THE WITNESS: Thank you.

8 THE COURT: Go ahead.

9 BY MR. SPIVA:

10 Q Does table seven in chart nine, is that part of the  
11 analysis of the political implications of these turnout  
12 changes?

13 A That is correct.

14 Q Can you explain?

15 A Yes. I don't think these charts should be a big  
16 surprise to anyone familiar with political patterns in the  
17 Commonwealth. They are a little hard to see. Maybe we --

18 Q One at a time?

19 A I am having trouble seeing.

20 Q Start with table seven?

21 A Yes, I think maybe so.

22 Q Table seven, make it a little bit bigger.

23 A I won't go through every number. I will look at some  
24 of the summaries. These are rounded numbers, of course.  
25 You know, they are not exact to the penny, but they tell a

1 picture.

2       You can see here that Republicans in the Commonwealth  
3 are dependent on white voters. On average of 59 percent  
4 of whites cast their ballots for Republican candidates.  
5 That includes president, U.S. Senate, and governor. Only  
6 one is kind of a blow-out election in 2008 when Republican  
7 candidates get less than 56 percent support from the white  
8 electorate.

9       Sometimes we talk about the political base, Your  
10 Honor, of political parties. Well, the political base of  
11 the Virginia Republican Party is among white voters. We  
12 can see very sharp contrasts when we turn to  
13 African-Americans, and less sharp, but still clear  
14 contrast when we turn to Hispanics and Asians.

15       Basically African-Americans are about 90 percent  
16 Democratic in their voting loyalty on average, voting only  
17 nine percent for Republican candidates.

18 Q     All right.

19 A     That is about a 50 percentage point gap. That is a  
20 huge gap. And then we see for Hispanics and Asians they  
21 are part of the Democratic base, although not as  
22 monolithically Democratic, but still overwhelming in a  
23 majority at about a third, almost a 27 percentage point  
24 gap.

25       So those turnout numbers have real political

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1 significance. The more whites go down in the component of  
2 the electorate, relative to minorities, the more that  
3 hurts Republicans and helps Democrats, simply put.

4 Q In terms of chart nine, how does that play in that  
5 analysis?

6 A Chart nine. It's the same thing. It just gives you  
7 a picture and, you know, the picture up there is not quite  
8 60 percent. I think it is 59 something.

9 Q Okay. This is basically in graphic form?

10 A Yes, just graphically shows the major differences,  
11 particularly between African-Americans and whites. Some  
12 thing that we saw in the other table.

13 Q Okay.

14 A It is about a 50-point gap.

15 Q All right.

16 Move to table eight. Explain what significance that  
17 has.

18 A Yes. It is a little complicated. I will really cut  
19 to the chase on this table.

20 As we saw, there is a 50-point gap between whites and  
21 African-Americans, about slightly more than 25 percent  
22 point gap between Asians and Hispanics and whites when it  
23 comes to partisan voting in Virginia.

24 But as I mentioned a moment ago, the exit polls also  
25 include information on other demographic groupings in the

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1 electorate that at least potentially have political  
2 significance. Men versus women. I don't mean that in the  
3 battle of the sexes. Age groups. High school versus only  
4 college graduate. Income levels. And while all of these  
5 have some political resonance, none come close to the  
6 gaps, not just for blacks and whites, but for whites and  
7 any minority. Biggest gap is an age gap of about ten  
8 points. 41 percent versus 51 percent Republican for young  
9 people versus people of my age or older. That compares to  
10 much larger gaps.

11       So if you are looking at a gauge of what makes  
12 partisan politics in the Commonwealth of Virginia, it is  
13 not any of these other things. It is race. That is the  
14 most fundamental divide politically. That is what really  
15 matters between Republicans and Democrats. And  
16 particularly the racial gap between whites and  
17 African-Americans. Not just because it is the widest, but  
18 because by far and away African-Americans are the largest  
19 minority voting block in the Commonwealth.

20 Q       What do you conclude from these recent patterns of  
21 turnout and partisan alignment?

22 A       What I conclude from these is, first of all, none of  
23 this can possibly be lost on Republicans in Virginia.  
24 This is well-known information. Politicians live and die  
25 on this kind of information, turnout and voting.

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1 And they could not miss the fact that the demography  
2 of voting has been cutting against them, and that they  
3 could reap significant political benefits by limiting the  
4 voting of minorities, particularly the voting of  
5 African-Americans relative to whites.

6 And so there is this motivation here for such  
7 limitations.

8 Q Did you next consider specific decision-making by  
9 Republicans in Virginia regarding voter photo ID laws?

10 A Yes, I did.

11 Q What did you consider first?

12 A Well, the first thing I considered was a very  
13 important distinction conceptually and practically when it  
14 comes to voter ID laws, and that is the distinction  
15 between strict and non strict voter ID laws. This has  
16 nothing to do with the particular components, that is,  
17 what IDs are allowed, what IDs are not. It rather has to  
18 do with the options available or not for a voter who does  
19 not have an authorized ID. In a non-strict state there  
20 are alternatives. Even without a acceptable voter ID in a  
21 non-strict state, you could cast a regular ballot or cast  
22 a provisional ballot that could be counted without you  
23 having to take any more steps. For example, in states  
24 like South Carolina and North Carolina if you don't have a  
25 requisite ID you could still cast a regular ballot by

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1 signing an affirmation of reasonable intent, it is called.  
2 Why couldn't I get an ID? Transportation problems,  
3 medical problems, a whole range of it. That is a  
4 non-strict example. Virginia used to have a non-strict  
5 option under pre-2012 law. And that is, you could sign an  
6 affirmation of identity at the polls and vote.

7 Now, we move to the strict. And under the strict  
8 voter ID if you don't have an acceptable voter ID,  
9 whatever it may be, and whoever the election official  
10 makes that decision, because it is not as if there is some  
11 absolutely objective template up there. You have only one  
12 option, and that is to vote what is called a provisional  
13 ballot, ballot that may or may not count. And to make it  
14 count, you take two steps. You have to get an acceptable  
15 ID, and there are different procedures in different states  
16 for doing that. And then you have to return that  
17 acceptable ID to the polls, the election officials have to  
18 agree that it is acceptable, and if all of that is  
19 fulfilled, your provisional ballot can be counted. If  
20 that is not fulfilled, your provisional ballot will not be  
21 counted and you are, in effect, disenfranchised in that  
22 election.

23 Q Why is that distinction important between a  
24 non-strict and strict ID law?

25 A It is critically important because it affects how you

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1 can make your vote count. It directly affects the  
2 implication of a voter ID law upon the voter.

3 I just finished testifying in the North Carolina  
4 case. And right before that case North Carolina actually  
5 changed its law from strict to non-strict, saying this  
6 makes the law much more acceptable because now poor  
7 people, minorities, can sign a reasonable impediment and  
8 will not be disenfranchised. That was a big debate in  
9 that litigation in which I was involved, and a big change  
10 in the law.

11 Q Thank you.

12 In '96 did Virginia enact a voter ID law?

13 A It did.

14 Q What did that law involve?

15 A Well, it was not a photo identification law. The  
16 identification laws don't have to be photo. You could  
17 present things like utility bills, government pay checks,  
18 voter registration cards, which are not photo. And it was  
19 not strict. That is, you could sign an affirmation of  
20 identity even if you didn't have one of the many available  
21 photo or non-photo identifications that would enable you  
22 to vote in the Commonwealth, Your Honor.

23 Q What followed in terms of proposed legislation to  
24 change the 1996 law?

25 A Well, there was a lot of push by Republicans in the

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1 state legislature to do two things; eliminate the  
2 non-photo option so it would become a photo voter ID law,  
3 not a non-photo voter ID law; and to eliminate the  
4 affirmation of identity option so that it would become a  
5 strict photo voter ID law.

6 Q Were there proposals for this in or around 2010?

7 A Yes. And there was a bill, I think it was called HB  
8 498, if I remember correctly, introduced at the time. And  
9 I think there was a divided government then, so the  
10 Democrats in the House killed the legislation. So as of  
11 2010 you still had the old 1996 non-photo, non-strict law  
12 in force.

13 Q What changed after that?

14 A Well, several things changed after that.

15 First of all, Virginia elected a Republican governor.  
16 And the Republicans gained control of the legislature by  
17 2012.

18 So the political complexion of the decision-makers  
19 switched from mixed to reasonably unified Republican. I  
20 believe it was pretty close in the Senate, almost equally  
21 divided. But with the deciding vote going to the  
22 Republicans.

23 Q What happened in 2012?

24 A Yes, it is a pretty complex story. I am not going to  
25 try to relate it all. But, basically two bills came out

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1 of the legislature. I think the one that was ultimately  
2 enacted -- essentially identical, called SB 1, to the best  
3 of my --

4 THE COURT: What year was this?

5 THE WITNESS: This was 2012, Your Honor.

6 THE COURT: Go right ahead.

7 THE WITNESS: Yes.

8 And basically what these bills did, was they didn't  
9 create a photo voter ID law. They maintained the option  
10 to use non-photo forms of ID; government pay checks, bank  
11 statements, utility statements, among others.

12 But this is why this distinction is so important,  
13 they moved from a non-strict to a strict form of voter ID  
14 law. That is, they eliminated the option to vote if you  
15 didn't have an acceptable ID by an affirmation of  
16 identity. These bills, of course, then went to the  
17 governor.

18 BY MR. SPIVA:

19 Q How did the governor respond to the legislation?

20 A Again, it is complex. He had a number of amendments  
21 and suggestions, many of which were adopted. But there  
22 was one critical recommendation of the governor that was  
23 not adopted. That was, in effect, to have a non-strict  
24 option in the 2012 voter ID legislation through something  
25 called signature comparison. That is, if you cast a

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1 provisional ballot and signed it, they could compare your  
2 signature on the registration rolls. If there was  
3 reasonable consonance in the signatures, that provisional  
4 ballot would be counted. So, in other words, there was an  
5 option, as in non-strict states to count a provisional  
6 ballot without the voter actually having to take another  
7 step. That was rejected by the legislature, and so in its  
8 final form the 2012 legislation was non-photo, but strict.

9 Q What else did the governor do?

10 A The governor also ordered voter registration cards to  
11 be sent out. And registrars to remind, contact voters who  
12 were voting provisionally, and remind them of the law's  
13 requirements. But there is no actual requirement that  
14 registrars do this. So you had differences across the  
15 state in what registrars were actually doing.

16 Q Was this -- at that point was section IV of the  
17 Voting Rights Act still enforceable, in effect?

18 A You mean section V, the pre-clearance section.

19 Q Yes, but section IV was --

20 A IV right, of course. Yes. At this time obviously  
21 this law, or any new law affecting elections and voting  
22 had to be pre-cleared by the United States Department of  
23 Justice because Virginia was a pre-clearance state under  
24 the Voting Rights Act. And the burden of proof was on the  
25 State of Virginia.

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1 That is, Virginia had to demonstrate to the  
2 satisfaction of the United States Department of Justice  
3 that this new law, or any new law, did not, did not do one  
4 of two things. Did not retrogress minority voting  
5 opportunities. In other words, turn back minority voting  
6 opportunities. And was not enacted with the intent to  
7 discriminate against minorities. So, Justice could fail  
8 to pre-clear a law either because it was retrogressive or  
9 because it was intentionally discriminatory. If that  
10 happened, the state still had the option of going into the  
11 D.C. courts and seeking a judgment from courts to overturn  
12 the lack of pre-clearance.

13 Q Was the 2012 law pre-cleared?

14 A It was. It was, I believe pre-cleared in August of  
15 2012 in time for the presidential and other elections that  
16 took place that year.

17 Q Obviously the presidential election in Virginia was  
18 that President Obama won the electoral votes in Virginia  
19 in 2012, and Tim Kaine won the Senate race. What were the  
20 implications of this election?

21 A You know, there is the old saying that elections have  
22 consequences. And this election had a lot of  
23 reverberating consequences in the Commonwealth of  
24 Virginia.

25 First of all, it was the first time since 1948 the

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1 Democrats had won consecutive presidential elections, with  
2 Obama winning in '08 and '12. Last time that happened was  
3 Franklin Roosevelt in 1944, Harry S. Truman in 1948.

4 Q With respect to Virginia.

5 A Only with respect to Virginia, of course, confirming  
6 that presidential elections in Virginia had become a swing  
7 state. Highly competitive. And, of course, a Democrat  
8 also won an open United States Senate seat and won it  
9 pretty handily, I think Kaine by about six points. And  
10 moreover, apropos of what we are looking at here,  
11 Republicans were very concerned with what they saw as this  
12 juggernaut Democratic turnout machine, particularly in the  
13 minority community, and particularly among young people.

14 MR. HEARNE: Your Honor, in terms of the witness'  
15 responses or conclusions of Republican's feared for a  
16 juggernaut, there has been no foundation laid for that  
17 kind of speculation.

18 THE COURT: I am not accepting it as fact. I am  
19 accepting it as something he concluded in drawing his  
20 ultimate conclusion. Not taking it as a fact, just his  
21 view.

22 MR. HEARNE: Thank you.

23 THE COURT: I understand.

24 THE WITNESS: I was about to document it.

25 THE COURT: I am not going to let you conclude things

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1 like that, Doctor.

2 THE WITNESS: I understand. That is why I was going  
3 to turn to my documentation.

4 THE COURT: You can do that as you wish, but I am not  
5 going to let you testify what the intent was of the  
6 reaction of the Republican party.

7 THE WITNESS: I understand.

8 THE COURT: Okay.

9 THE WITNESS: History --

10 THE COURT: Not out of disrespect, but I am just  
11 putting some limitations on you. All right?

12 THE WITNESS: Of course, Your Honor. If I may  
13 finish.

14 THE COURT: Yes. Sorry. Go ahead.

15 THE WITNESS: Thank you very much.

16 I just saw yesterday an e-mail from Republican  
17 Congressman Rob Wittman who had met with --

18 MR. HEARNE: Your Honor, that is not in evidence,  
19 what he is referring to is a --

20 MR. FINBERG: It is the e-mail we talked about.

21 THE COURT: The objection is sustained. You may not  
22 publish that. You can certainly consider it, but you  
23 can't publish it in the record. All right. Okay.

24 MR. SPIVA: We were not intending to, but as a expert  
25 I think, Your Honor --

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1 THE COURT: He can rely upon it, but not publish it  
2 in the record.

3 BY MR. SPIVA:

4 Q We are not intending to.

5 A Thank you. I was going to say, this e-mail is pretty  
6 explicit. It talks about the sophisticated voters  
7 registration and turnout efforts of the Democrats. It  
8 talks about Hispanic turnout being a significant part.  
9 And it talks about how the Obama folks are reaching into  
10 youth, and particularly youth, with minority community  
11 ties. So it directly relates to the issue of the response  
12 to what is politically happening in Virginia, and at least  
13 the assessment of some within the Republican party that  
14 this is tied to turnout efforts, successful turnouts  
15 efforts by Democrats and particularly the successful  
16 turnout efforts by Democrats, Your Honor, within the  
17 minority community.

18 THE COURT: Okay, sir. Go ahead.

19 BY MR. SPIVA:

20 Q What then followed this election, the 2012 election  
21 with respect to voter ID, Dr. Lichtman?

22 A Yes. Something, you know, that really caught my eye  
23 as a political analyst and historian. The 2012  
24 legislation had just been pre-cleared in August of 2012.  
25 Of course you know the public pre-cleared document talked

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1 about how effective this law was in meeting the twin  
2 objectives of safeguarding the ballot and making sure that  
3 nobody gets disenfranchised. But then what we have is  
4 less than a half a year later Republicans in the state  
5 legislature led by Senator Mark Obenshain -- I hope I am  
6 pronouncing that correctly -- introduced a brand new bill.  
7 Not just an amendment of the 2012 legislation, but SB  
8 1256, which represented an entirely different type of  
9 voter ID law. Because it now moved to a strict photo  
10 voter ID law eliminating such readily-available non-photo  
11 IDs as utility bills, bank statements, pay checks,  
12 government checks, et cetera.

13 Q Let me direct your attention to page 26 of the  
14 initial report. Plaintiffs' Exhibit 212. Does this  
15 reflect a list of the types of ID that were permissible  
16 under the 2013 photo ID law?

17 A Yes. With one small caveat, which I guess I will get  
18 into, and that is you notice some say "valid" and some  
19 don't. But leaving that aside, these are the types of IDs  
20 that, all of which are photo IDs that are acceptable under  
21 this bill that was introduced, I believe, January 1st,  
22 2013, SB 1256.

23 Q Did the photo ID requirement of the 2013 law extend  
24 to mail-in absentee ballots?

25 A It did not. So voters could, with an excuse -- and

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1 they are pretty broad -- get an absentee ballot and send  
2 it in without ever having a photo ID.

3 Q What would happen if a voter did not present an  
4 authorized ID at the polls?

5 A Under this strict law you couldn't vote if you didn't  
6 have acceptable ID, and that is both in terms of the list  
7 and in terms of what the election official decides at the  
8 polls. You then can walk away and decide, you know, all  
9 right, I am not going to bother. Or, you are supposed to  
10 be offered a provisional ballot. I think I indicated my  
11 understanding of provisional ballot previously.

12 Q What were the implications?

13 A I didn't finish.

14 Q Pardon me.

15 A And then if you cast a provisional ballot you have  
16 three days in which to return or have --

17 THE COURT: We have already had detailed testimony  
18 from numerous witnesses about that.

19 THE WITNESS: I am done.

20 THE COURT: Thank you.

21 THE WITNESS: I don't know what other witnesses have  
22 said.

23 THE COURT: All right.

24 BY MR. SPIVA:

25 Q Let me ask you to put table nine up on the screen.

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1 What were the implications of elimination of the  
2 affirmation -- I'm sorry --

3 A I think it says "affirmation of identity" there on  
4 page nine.

5 Q Yes. What were the implications of elimination of  
6 the affirmation of identity?

7 A Yes. One of the big issues that I have seen in  
8 examining the materials in this case is the differing  
9 percentages and real people. Virginia is a big state. It  
10 has got, you know, five million registered voters. Close  
11 to four million can turn out in an election. So a small  
12 percentage can still mean a lot of real people. And  
13 according to the source from the State that I have cited  
14 here, you get about a .25 percent average in these  
15 previous elections when you could use an affirmation of  
16 identity, and while it seems kind of inconsequential, it  
17 is not because of the large number of people voting in  
18 Virginia. And in the 2008 general table, it shows that  
19 9,382 voters taking advantage of this. And in 2010  
20 general, a mid term, we get a lot of turnout it is:  
21 5,536.

22 So we are talking about an option that affected  
23 substantial numbers of voters in the presidential and  
24 congressional year elections when that option was  
25 available, no longer available under SB 1256.

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1 Q What was the position of the governor's office with  
2 respect to the enactment by the legislature of SB 1256?

3 A Yes, that is one of the more interesting features of  
4 what was going on in this enactment. I didn't have this  
5 e-mail series from the governor's office for my initial  
6 report, but it is in my rebuttal report.

7 Q If we could put Plaintiffs' Exhibit 119. This is in  
8 evidence, Your Honor.

9 THE COURT: All right.

10 BY MR. SPIVA:

11 Q Go ahead, Doctor.

12 A Yes, I was going to say the e-mail series indicates  
13 that the governor and the governor's high level staff did  
14 not see any need to change the 2012 law to move into a  
15 strict voter photo ID law. And it is exactly the course  
16 responsible for administering the election laws and  
17 overseeing them. And e-mails from high level staffers in  
18 the governor's office indicate specific reasons why they  
19 had this opposition six months after everyone had affirmed  
20 the 2012 law, including the submission to Justice to move  
21 towards the new law. I think that is the first in the  
22 series of --

23 Q Turn to the next page. You quoted this in the  
24 rebuttal report, Dr. Lichtman.

25 A Yes. I can't quite see it. I can see it in my

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1 report.

2 Q Is it easier if I had the rebuttal report pulled up  
3 to the page where you cite this?

4 A Yes, this, I think this is, at least for my eyes, is  
5 too small to see.

6 Q Can you put up Exhibit 215, which is Dr. Lichtman's  
7 reply.

8 A Yes.

9 THE COURT: 119 and 215 are in evidence, Mr. Spiva?

10 MR. SPIVA: Yes, 215 is Dr. Lichtman's rebuttal  
11 report, which is, along with all the other expert reports,  
12 is in evidence.

13 THE COURT: Okay.

14 MR. SPIVA: 119 is --

15 THE COURT: All right.

16 MR. SPIVA: -- also stipulated, not objected to. I  
17 guess maybe I should move to --

18 THE COURT: Any objection?

19 MR. FINBERG: Not to that exhibit.

20 THE COURT: It will be received.

21 BY MR. SPIVA:

22 Q And so then maybe we can maybe make it a little  
23 larger, the one that begins, I'm trying to get some stats.

24 A Okay. So this is an e-mail on January 18, 2013. At  
25 the beginning of the legislative session. It is from

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1 Tucker Martin, Governor McDonnell's communications  
2 director, a high-level staffer. And it was sent to six  
3 other members of the governor's staff.

4 And what this e-mail demonstrates is that from the  
5 perspective of the governor's staff they did not want to  
6 get involved in what they call Republican's titan voter  
7 restrictions. They saw moving to a photo voter ID law and  
8 eliminating such regularly at hand IDs such as pay checks,  
9 and utility bills as a tightening of voter restrictions,  
10 and critically, they did not see any real issues under the  
11 2012 law in a very high turnout presidential election year  
12 of 2012. They specifically cite Governor McDonnell for  
13 saying he believes *"Virginia's system as currently*  
14 *constructed has strong safeguards against any voter fraud.*  
15 *And he supports it in its current form."*

16 That goes to the heart of justification for changing  
17 the law. Not only does it have safeguards presently in  
18 the view of the Governor, it has strong safeguards. And  
19 why should we tighten up voter restrictions when we don't  
20 need to.

21 Q Was there a follow-up e-mail, if you can --

22 A There was.

23 Q -- go to that. If we can do the part, which is the  
24 follow-up e-mail. Maybe down to the next page.

25 A The whole thing.

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1 Q What does that e-mail show?

2 A It is a follow-up e-mail, and it makes reference to  
3 what we have been talking about, the 2012 law, which the  
4 Governor, the submissions to the Department of Justice,  
5 the sponsor, Senator Obenshain, other Republican members  
6 of the legislature, and all affirmed would protect the  
7 integrity of the ballot, guard against fraud, but not  
8 disenfranchise anyone. So following the expansion last  
9 time to protect the integrity of the democratic process we  
10 got the high turn out presidential year, this is the  
11 critical sentence, "It was a successful test of our  
12 system."

13 You weren't getting a whole lot of provisional  
14 ballots being filed. And, again, this is critical. "The  
15 system worked as designed to prevent voter fraud, and to  
16 insure that registered voters were able to cast their  
17 ballot and have their vote counted."

18 Again it reiterates that the current system has  
19 strong safeguards against fraud. And is proven, not just  
20 theoretical as might have been at the time of its passage,  
21 whenever one was saying it would safeguard against voter  
22 fraud and not disenfranchise anybody, but it has in  
23 practice worked exactly as intended.

24 Q Did other officials in the Governor's office also  
25 weigh in on that matter?

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1 A Yes.

2 That is correct.

3 Q We may need to zoom back to the, if we can, maybe,  
4 blow up a little bit. It starts at later down to where  
5 the bates number is.

6 What did other officials in the Governor's office --  
7 what significance did you find in how they weighed in?

8 A This is Lisa Hicks's comments, who is the Governor's  
9 Secretary of Administration, very significantly a former  
10 Deputy Attorney General, so she would be quite familiar  
11 with voter ID laws and their implications given her former  
12 position. And she indicates that any new laws and  
13 regulations should be focused on the registration process.  
14 Not upon any new requirements for voting at the polls. I  
15 don't know what she had in mind on the registration  
16 process, but it is clear from this that she didn't see any  
17 need to change voter photo ID, which had nothing to do  
18 with the point of registration. The voter photo ID would  
19 only come into play when she would register and try to  
20 vote.

21 Q What did Senator Obenshain do subsequent to this?

22 A Senator Obenshain went ahead and pushed through the  
23 adoption of SB 1256, which was the strict photo voter  
24 identification law. New law, not just amendment of the  
25 old law.

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1 Q Was it openly signed?

2 A It was ultimately signed by the Governor, although he  
3 issued a statement very similar to what is in these  
4 e-mails reaffirming that he thought the present system was  
5 working.

6 Q What was your ultimate assessment of the  
7 implications, as a historian, of these e-mails for the  
8 issue of intent?

9 A I think it has direct bearing on the issue of intent.  
10 Here you had the Governor's office, executive responsible  
11 for overseeing and administering elections saying on a  
12 substantive basis there is absolutely no need to change  
13 the existing law. It safeguards against fraud. It  
14 doesn't disenfranchise anyone. It has worked in a very  
15 high turnout presidential election, there is no need for  
16 change.

17 So, this raises the issue, you know, what is the  
18 other motivation for Senator Obenshain and his allies in  
19 the legislature for pushing this through? And I think we  
20 saw in all of the previous analyzes that any measure that  
21 potentially would limit African-American, or more  
22 generally minority turn out relative to whites would  
23 benefit Republicans within the State of Virginia.

24 Q In your research, issue of intent, do you typically  
25 expect to see decision-makers openly express the

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1 discriminatory intent behind the laws if there is  
2 discriminatory intent to the laws they are passing?

3 A Quite the contrary.

4 Q Why not?

5 A First of all, politicians are sophisticated,  
6 particularly in the modern era. And particularly in the  
7 modern litigious post-Voting Rights era. They are highly  
8 unlikely to express openly anything smacking of  
9 discriminatory intent. This is particularly true in --  
10 remember, this is when section V was still in force.  
11 Section IV had not been invalidated yet by the court.  
12 That didn't come until after the passage of SB 1256. And  
13 one of the provisions of the Voting Rights Act that could  
14 get a new law invalidated was that it was passed with  
15 discriminatory intent. So certainly no politician in the  
16 State of Virginia is going to risk having the law  
17 invalidated by expressing open discriminatory intent.

18 THE COURT: Let me ask you a couple of quick  
19 questions. Did this bill come out of committee on a  
20 straight party line vote? Coming out of committee.

21 THE WITNESS: I am trying to remember. I think  
22 everything was, including committee, was either straight  
23 party line or very close to straight party line vote yes.

24 THE COURT: And the floor vote was a straight party  
25 line vote?

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1 THE WITNESS: Virtually straight. May have been one  
2 or two strays, but virtually straight party line. Might  
3 have been completely straight party line vote.

4 THE COURT: Now, I think we have heard testimony that  
5 Obenshain's provision may have been added by a committee  
6 to resolve the differences between the House and the  
7 Senate bill. Am I correct on that?

8 THE WITNESS: I am not certain. Which provision are  
9 we talking about?

10 THE COURT: The provision that added the voter ID.  
11 The requirement of the voter ID.

12 THE WITNESS: My understanding, I could be wrong, but  
13 my understanding is that that was in the initial version  
14 of the bill.

15 THE COURT: I am sure you have read it closer than I  
16 have. Go ahead.

17 BY MR. SPIVA:

18 Q Is there evidence of political non-substantive  
19 motivation in the interpretation of SB 1256 by the State  
20 Board of Elections?

21 A Yes. And this is important because there are two  
22 pivot points here. One is obviously the introduction and  
23 adoption of the law. The other is the construction of the  
24 law the following year by the State Board of Elections,  
25 which became an extremely political process.

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1 Q How did that evolve?

2 A Well, again, that evolved in kind of a complex way.

3 The State Board of Elections had to draft regulations  
4 as to what counted as a valid ID. Remember when we saw  
5 the list, some said "valid," some simply listed the ID.

6 But, the Board, three-person board, had to decide  
7 what was meant by "valid." And in particular, the issue  
8 was accepting expired ID, particularly for the most common  
9 forms of ID, that is, licenses, of course, passports. And  
10 this also implicated student IDs as well.

11 That process began with the State Board of Elections.  
12 I think I have something on this from a deposition. Can  
13 you put it up from the reply report, page 35?

14 Q Before you hone in, could you direct us to what you  
15 are referring to?

16 A Says, McClees testified and then there is something  
17 from the deposition.

18 Q Now, if we could --

19 A Highlight that.

20 Q Yes.

21 A That will help.

22 So the Board originally makes the decision that we  
23 are not going to invalidate IDs because of an elapsed  
24 expiration. So if my -- driver's license.

25 THE COURT: I think some members of the Board already

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1 discussed that. We have had a detailed discussion of that  
2 by the person who drafted it.

3 THE WITNESS: Okay.

4 THE COURT: Okay.

5 THE WITNESS: I didn't know that.

6 THE COURT: I know you didn't. Go ahead.

7 THE WITNESS: I will be quick.

8 THE COURT: I already went to the next question.

9 Okay.

10 BY MR. SPIVA:

11 Q Let me ask you. Did you consider on, I guess page  
12 five and six of your reply report statements by Charles  
13 Judd, the former chair of the Republican -- sorry. Former  
14 chair of the Board of Elections?

15 A I did. This is important because, very quickly -- I  
16 don't know if it was covered already, Your Honor -- Judd  
17 said there is a reason why we are going to allow expired  
18 IDs, because we don't care whether a person is still  
19 capable of driving or not. We just want to establish  
20 identity. Expired ID can establish identity. This is  
21 very important, Your Honor.

22 We don't have in Virginia data directly on how many  
23 expired IDs, let's say, licenses expired. We had it in  
24 North Carolina, though. Some of the experts defendants  
25 brought in North Carolina, for example. There were many

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1 hundreds of thousands of persons with expired, just  
2 looking at DMV IDs. And they were very disproportionate  
3 minorities. This is not just a technicality. This is a  
4 decision that could affect the voting rights of hundreds  
5 of thousands of individuals within Virginia. Also,  
6 there's been data presented by the state that in one year,  
7 more than 500,000 persons had their licenses suspended.  
8 To get them renewed, you have to pay money.

9 MR. HEARNE: To the extent this witness is trying to  
10 present his view of what evidence has been presented by  
11 the Commonwealth, I think it is inaccurate, first off.  
12 Secondly, if it is part of his opinion I don't mind him  
13 saying that, but I don't think its certainly evidence or  
14 an accurate statement.

15 THE COURT: I am only accepting it as a premise to  
16 his ultimate expert conclusion. That is all I will say at  
17 this point. Go ahead.

18 THE WITNESS: My point was this involves a lot of  
19 people.

20 THE COURT: Okay.

21 BY MR. SPIVA:

22 Q What if the ID is so old the picture no longer  
23 resembles the person? Did you review any testimony  
24 concerning that?

25 A Yes. It is not in my report, but it is in deposition

1 testimony.

2 Q The deposition testimony of Mr. Alcorn?

3 A Yes. I just got that three days ago.

4 Q That deposition was just taken on Saturday, Your  
5 Honor. That is why it wasn't available at the time of his  
6 reply report.

7 MR. HEARNE: Your Honor, to the extent that this  
8 witness is now going to be testifying about things that he  
9 didn't --

10 THE COURT: I am not going to allow him to recite  
11 portions of Mr. Alcorn's deposition. As we know, the  
12 expert can rely upon that. But you cannot recite it in to  
13 the record as substantive evidence. So that objection is  
14 sustained.

15 MR. HEARNE: Right. And I would note also, Your  
16 Honor, to the extent he is going to bring in new facts or,  
17 something that wasn't the basis for his report, it was  
18 something that didn't exist at the time of his report.

19 MR. SPIVA: That is because Mr. Alcorn wasn't made  
20 available to depose until Saturday.

21 THE COURT: Go ahead.

22 BY MR. SPIVA:

23 Q I won't put up the quote, but did you rely upon and  
24 consider once it was available to you the statements by  
25 Mr. Alcorn in his deposition concerning expired or

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1 out-of-date license?

2 A Yes. It confirmed the common sense that there is a  
3 requirement for reasonable resemblance. So if your  
4 license is 30 years old, you don't look like it any more,  
5 you are not going to have it accepted.

6 THE COURT: All right.

7 Are we at a good point for a short recess?

8 MR. SPIVA: Yes.

9 THE COURT: We will take a ten or 15 minute recess. I  
10 will come back -- how much longer do you think direct will  
11 take? Five minutes?

12 MR. SPIVA: I think we have got some time, Your  
13 Honor.

14 THE COURT: Okay. Hope springs eternal.

15 MR. SPIVA: I believe he will be the last witness  
16 other than potentially Congressman Wittman, which is  
17 another issue.

18 THE COURT: All right. Fine.

19 Take a ten minute recess.

20 (A recess was taken.)

21 (Krista Harding is now the court reporter.)

22 THE COURT: All right. We'll continue with the  
23 direct examination.

24 MR. SPIVA: Thank you, Your Honor.

25 BY MR. SPIVA:

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1 Q Dr. Lichtman, what happened after the Board made the  
2 decision to accept expired IDs?

3 A Senator Obenshain, I think I've mentioned previously,  
4 chief sponsor of 1256, wrote a letter to the Board asking  
5 the Board to reconsider this decision saying that he saw  
6 tension between elements of this rule and provisions of  
7 state election law.

8 MR. SPIVA: Actually, if we can put up Plaintiffs'  
9 Exhibit 132. Leave the one page for a second, and then go  
10 to the second page.

11 BY MR. SPIVA:

12 Q Let me just ask you if this is the letter that you  
13 considered?

14 A Yes.

15 Q Okay. And on Page 2, was there anything in  
16 particular that you drew upon in coming to your -- in  
17 considering -- in your analysis?

18 A He also talked about the need for the public comment  
19 period in order to create rules for what is to be defined  
20 as valid as opposed to not valid. But no where here on  
21 this page, or on the previous page, does he directly  
22 challenge the logic of Chairman Judd, a Republican, by the  
23 way I believe, at the majority on the Board, that in terms  
24 may not necessarily be using a license to drive or a  
25 passport to travel, but for purposes of identity, valid,

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1 could perfectly well be an expired ID.

2 And by the way, the legislature had also, and this is  
3 in my report, discussed modeling it on Georgia, an older  
4 ID law which accepted expired IDs.

5 MR. SPIVA: If you can bring up the last paragraph of  
6 this.

7 BY MR. SPIVA:

8 Q You quoted this in your report, part of this  
9 paragraph, Dr. Lichtman, is that right?

10 A That is correct.

11 Q Why did you quote that?

12 A Because this is urging the Board of Elections, this  
13 is, you know, a leading politician within the legislature  
14 to revisit the matter immediately. It to revisit its  
15 already made decision to accept expired photo IDs, and to  
16 open any subsequent action to public comment. It's also  
17 interesting that he says "*whether or not the new rule can*  
18 *be justified on policy grounds,*" indicating that perhaps  
19 indeed the Board made a reasonable policy decision. And  
20 he also is very strong here in talking about the need for  
21 transparency. The need to get public involvement in this  
22 decision.

23 MR. SPIVA: And we can take that down.

24 BY MR. SPIVA:

25 Q How did the Board respond, Dr. Lichtman?

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1 A Well, the Board responded with a new rule that was  
2 very tight which said we'll accept expired IDs, but not  
3 IDs expired 30 days or more.

4 Q And did the Board follow this process and wait until  
5 the end of the public comment period to make a final  
6 decision?

7 A It's a little more complicated, but the answer is no.

8 Q And we've heard some testimony on this this morning,  
9 but I want to basically know what you drew into your  
10 analysis in terms of the process for defining a valid ID  
11 in looking at the various documents.

12 A Yes. I had two -- well, I had a critical document in  
13 my -- I think it's in my response report because I hadn't  
14 seen it before then, and that was the deposition of  
15 Mr. McClees who pointed out that well before the end of  
16 the public comment period in August, a decision as a  
17 result of this political intervention had already been  
18 made. And that decision was to not accept IDs that had  
19 been expired for more than a year.

20 In addition, Mr. McClees indicated that he is the one  
21 to sift through and analyze and pass on the comments to  
22 the Board. But the final Board vote was so close to the  
23 end of the comment period that he had no opportunity to do  
24 so. In other words, this push for transparency, and  
25 public comment, was never real. The decision was made

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1 before the public comments were in. And the public  
2 comments were never seriously considered in the final  
3 vote.

4 MR. HEARNE: Your Honor, --

5 THE COURT: Objection sustained.

6 He is drawing a conclusion that they were never  
7 considered.

8 MR. HEARNE: That was my objection, Your Honor, as  
9 well as that this is again going back over the testimony  
10 the Court already noted.

11 THE COURT: Well, he's already gone over it, so  
12 that's fine.

13 MR. SPIVA: I was trying to not have him put up the  
14 testimony we've heard again.

15 THE COURT: That's fine. You handled it well. I'm  
16 just not allowing the conclusion in.

17 MR. SPIVA: Okay. The testimony supports the  
18 conclusion, Your Honor. That's the only reason why -- and  
19 I was trying to kind of cut to the chase.

20 THE COURT: That's his opinion.

21 MR. SPIVA: All right.

22 BY MR. SPIVA:

23 Q And let me ask you, what conclusion did you -- did  
24 your analysis lead you to in terms of the effectiveness of  
25 Senator Obenshain's writing to the Board?

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1 A Obviously, in my view, and based on the evidence I've  
2 looked at, and also some other deposition evidence I  
3 believe from Mr. Cortes that I just saw in the last couple  
4 of days, also went through the same process that -- same  
5 description as Mr. McClees, that the political  
6 intervention of Senator Obenshain was critical in getting  
7 the Board to switch from its initial decision, which not  
8 only had accepted, but justified to changing that  
9 decision, and -

10 THE COURT: Okay.

11 Go ahead.

12 A - and to not accepting certain kinds of expired IDs.

13 Q Did the regulations on the eliminations of IDs  
14 expired more than one year apply to all IDs?

15 A They didn't. I think we see it, Your Honor, in that  
16 list. Some were called valid and some were not called  
17 valid. They only applied to IDs that had the term "valid"  
18 attached to them. For example, they applied to licenses,  
19 and other DMV IDs. They applied to passports, and they  
20 applied to student IDs.

21 And so, you know, there was distinctions among the  
22 kinds of IDs that a voter would have to understand were  
23 acceptable or not acceptable.

24 Q I'd like to now turn to a slightly different topic -  
25 the timing of the 2013 law. You had testified earlier

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1 that the 2012 law was signed and precleared in 2012, May  
2 and August of 2012, and followed by the 2013 law. In your  
3 experience as a political historian, has any other state  
4 enacted a voter ID law, and then replaced it with a  
5 fundamentally different law in less than a year?

6 A I'm always reluctant to affirm a negative. But in my  
7 experience, I've not seen that. Not that quickly and not  
8 that fundamentally.

9 Q And could this substantive change be a result of  
10 voter fraud in Virginia?

11 A No.

12 Q What type of voter fraud could potentially be  
13 prevented through SB1256?

14 A Based on the Virginia law, the only type of voter  
15 fraud that could plausibly be prevented is voter  
16 impersonation at the polls. That doesn't apply to  
17 absentee ballots.

18 Q And did you consider any deposition testimony by  
19 Mr. Cortez or Mr. Alcorn regarding their assessment of --  
20 as representatives respectively at the Department of  
21 Elections and the SBE, of the type of voter fraud that  
22 could be prevented by SB1256?

23 A Yes. This is what historians do. We reach our  
24 conclusions, and when additional evidence becomes  
25 available we look at it.

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1 Q And what -- what role did that play in your analysis?

2 A Well, it confirmed what I had already concluded from  
3 my analysis of SB1256, that only voter impersonation, not  
4 other types of fraud, could be prevented by this  
5 particular law in Virginia.

6 Q And did you assess, through the lens of a historian,  
7 whether voter impersonation fraud could plausibly explain  
8 the enactment of the 2013 law?

9 A I did.

10 Q And what did you find?

11 A I found that to the contrary it couldn't explain it.

12 Q What was that based on?

13 A That was based on two studies that appeared shortly  
14 before the adoption of the 2013 law. The first one came  
15 out in November of 2011 by the Republican National  
16 Lawyer's Association. This is important because their  
17 avowed purpose was kind of to debunk what they believed  
18 was the Democratic myth that there's no voter fraud. And  
19 they looked at both charges and convictions, and they  
20 found, I think, over a broad period of time, going back to  
21 2000 to 2010, no instances of voter impersonation in  
22 Virginia.

23 And nationally, looking at 19 states with no  
24 requirements whatsoever for ID at the poll, like Maryland  
25 where you just walk in and vote, there were something like

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1 five cases of voter impersonation in all of those states  
2 out of hundreds of millions of ballots cast. Then more  
3 shortly before enactment of SB1256 in August of 2012, in  
4 this critical period, in fact, between passage of the 2012  
5 law and passage of the 2013 laws, pivotal period, an even  
6 more ambitious study came out by News 21, a national  
7 reporting project made up of 11 universities.

8 And it went beyond the Republican National Lawyer's  
9 Association. It looked at allegations as well as charges.

10 THE COURT: In Virginia?

11 DR. LICHTMAN: Did every state. And it did the State  
12 of Virginia, and it found not a single case in Virginia.  
13 And it also went back to 2000, covering a very broad swath  
14 of time. You know, huge numbers of ballots being cast.

15 THE COURT: And there's never been an allegation of  
16 voter fraud in Virginia?

17 DR. LICHTMAN: I have not found an allegation that is  
18 specific. In other words, you get them. When I was  
19 reading through the transcripts of the General Assembly, I  
20 found a couple of instances where a member would provide  
21 kind of an antidote. You know, someone told me that.  
22 Someone came to the polls and then ran. There were two or  
23 three of those antidotes. No names were named, so it  
24 wasn't an allegation that anyone could check, obviously.

25 And, you know, it was the kind of story that you

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1 often hear, but it's totally unproven. So beyond that, I  
2 have not seen, looking at all of these studies, and  
3 reading the testimony in the deposition of Mr. Cortes and  
4 Mr. Alcorn, who also could not recall -- I'm not sure if  
5 they were specifically asked allegations. They talked  
6 about cases. They could not recall any cases.

7 So in terms of a checkable, credible, named  
8 allegation of voter impersonation, I have not seen one in  
9 Virginia, and there is not one in either of these very  
10 large studies, including the News 21 study that looked not  
11 only at charges and convictions, but any allegations that  
12 I could find in the press.

13 THE COURT: Okay.

14 BY MR. SPIVA:

15 Q Is it possible that there were no allegations or  
16 confirmations of impersonation voter fraud in Virginia  
17 because such fraud is hard to detect?

18 A You hear that argument often, and the answer, for a  
19 couple of reasons, is no.

20 Q And can you cite studies of academic studies and  
21 their findings?

22 A Yes. I'm not going to go through all of the academic  
23 studies, but there are number of academic studies, Your  
24 Honor, a couple of them documented in my report, that  
25 don't depend upon allegations that use different

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1 methodologies.

2 Let me give you one example. It's a study by M.V.  
3 Hood, III and Charles Bullock, III. He's an authority  
4 that is actually cited by experts for the defendants. And  
5 this study looked at --

6 THE COURT: Can you kind of abbreviate it a little  
7 bit, please.

8 DR. LICHTMAN: Sure.

9 It looked at the issue of dead people -- or people  
10 voting in the name of dead people. The most common  
11 allegation you can find. And it found in the State of  
12 Georgia, out of more than 2 million ballots cast, no  
13 fraudulent votes were cast in the name of dead people.

14 And there are other studies that don't depend on  
15 allegations that come to the same conclusion.

16 THE COURT: Thank you.

17 DR. LICHTMAN: Yes.

18 BY MR. SPIVA:

19 Q And, Dr. Lichtman, can you cite an example of a  
20 postelection scrutiny of voter fraud that you were  
21 actually involved in?

22 A I was, believe it or not. In 1994, the Democrat,  
23 Parris Glendening, won a very close gubernatorial election  
24 in my home state of Maryland. The results were challenged  
25 by his opponent, Ellen Sauerbrey. And she charged

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1 election fraud. A variety of charges. The most prominent  
2 was voting the dead, or voting from addresses that don't  
3 exist. Things like that. Some of which involved directly  
4 voter impersonation.

5 I was hired by a very respected long-time Attorney  
6 General then, Joe Curran. And Curran said to me, "*If*  
7 *there's voter fraud going on in my state, I want to know*  
8 *about it. I want you to check out that every allegation*  
9 *that Ms. Sauerbrey has made.*"

10 We checked them all and found not a single instance  
11 of voter fraud. We found mistakes, which you always do.

12 THE COURT: Okay.

13 A And the case went to trial, by the way.

14 And Judge Thieme, in the District Court, said, "*Hey,*  
15 *I voted for Ms. Sauerbrey, but there's no case here.*" And  
16 he dismissed it.

17 Q Did you consider what the proponents of SB1256 cited  
18 as justification, a video involving a Democratic  
19 operative, Patrick Moran?

20 A I did.

21 Q And did this video provide a credible basis for the  
22 new photo ID law?

23 A I think just the opposite.

24 Q Why do you say that?

25 A I think this video, though it showed a lot of foolish

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1 talk by Patrick Moran, showed just how difficult, if not  
2 impossible, it is, even under the old law, which was  
3 confirmed by the Governor well after he knew about the --  
4 you know, at least the Moran video was well publicized  
5 before that.

6 And here is why: First of all, even with utility  
7 bills, and they said, you know, it would be much harder  
8 with things like bank statements, even with a utility  
9 bill, you have to have the following: Number one, you  
10 have to find a forger. You have to find someone willing  
11 to engage in the crime of forgery and risk prosecution.  
12 Cast a vote.

13 Two. You have to find targets. You have to find  
14 people in whose name you can vote. And you have to be  
15 sure they haven't voted already. And as the video  
16 indicated, you can't call them and ask them because you'd  
17 then be alerted to the scheme.

18 Three. You have to find people willing to cast a  
19 single vote to be convicted, to be prosecuted, to be sent  
20 to prison for several years. In addition, you had to make  
21 sure that the person would not be recognized as not the  
22 person he is impersonating.

23 And I turn to a respected survey of the electorate.  
24 And that survey found in Virginia, specifically, 13.1% of  
25 voters knew the person who checked them in. That's one

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1 out of seven or eight. So you're risking a one out of  
2 seven or eight chance to go to prison in order to cast one  
3 vote. That's why, in the end, even someone as foolish as  
4 Moran basically said, look, you're better off spending  
5 your time and your energy and your efforts getting out the  
6 vote.

7 This video, to me, as an expert in this field, shows  
8 even under the old law, it's implausible, if not  
9 impossible, to orchestrate voter impersonation.

10 Q And is that sustained by other findings, for  
11 instance, by the United States Election Commission?

12 A Yes. The United States Election Commission addressed  
13 this issue of types of voter fraud. And it concluded that  
14 voter impersonation was certainly among this least likely  
15 because the risk reward was terrible. That is, to cast  
16 one vote, you're creating such a risk of being -- going to  
17 prison, being severely punished, if in fact there was --  
18 and we don't know of anyone, if there was anyone in the  
19 State of Virginia who wanted to vote in someone else's  
20 name or arrange voter fraud. A much more efficient and  
21 much safer way is through absentee ballots, which don't  
22 require any kind of identification, either under the old  
23 law or under SB1256.

24 Q Did you study the alleged examples of voter fraud in  
25 the defendants' proposed findings of fact?

1 A I did.

2 Q And what did you conclude about that?

3 A Well, first of all, what I found was very interesting  
4 was the time period. It covered 50 years, billions of  
5 ballots were cast, and a couple of things. One, the last  
6 example, even if you take it at face value, which you can,  
7 is in 2005. There were no examples from the last 11  
8 years.

9 So for you to objectively look at it, you would  
10 conclude maybe a decade ago, and more, there were problems  
11 with voter fraud, but no longer. No examples of any kind  
12 from Virginia. Not of any kind of fraud, much less a  
13 voter impersonation. No credible examples of voter  
14 impersonation anywhere.

15 And for the most part, it relied on newspaper  
16 articles. And even when you looked at citations that  
17 weren't newspaper articles, like the Carter-Baker  
18 Commission Report, when you actually looked at what the  
19 underlying source was, particularly for this very  
20 spectacular allegation of, you know, 181,000, I think it  
21 was noncitizens on the voting rolls, the source was a  
22 Chicago Tribune Newspaper article. And sometimes it  
23 sources to things that doesn't have any underlying  
24 sources.

25 Q Let me -- how many allegations of voter fraud did the

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1 findings cite specifically to Virginia over this more than  
2 50-year period?

3 A None of any kind, much less voter impersonation. Not  
4 even newspaper cites.

5 Q Let me shift gears. Did you make -- also make  
6 findings relative to the disparate impact on  
7 African-American voter opportunities relative to white  
8 opportunities under SB1256?

9 A Yes. That's one of the things the Arlington Heights  
10 guidelines and basic historical methodology would have you  
11 do.

12 Q And were these findings based on information  
13 available at the time of adoption of SB1256?

14 A That is correct.

15 Q And what -- at the time of the adoption of SB1256,  
16 were photo ID laws the subject of controversy?

17 A To put it mildly. It was one of the most hotly  
18 debated controversial issues. A whole voters march in  
19 commemoration of the Selma March. It was launched in  
20 Alabama. It was the subject of debate in the press.  
21 There had been court cases. A couple of laws in  
22 Pennsylvania and Texas were blocked.

23 So, yes, any politician was well aware -- had to be  
24 well aware of these controversies. As I say, politicians  
25 live and die on these kinds of things.

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1 Q Were there studies available at the time of the  
2 adopting of SB1256 documenting racial disparities in the  
3 possession of voter photo IDs?

4 A Oh, yes.

5 Q And was the Virginia General Assembly made aware of  
6 charges, at least, that voter photo ID laws discriminated  
7 against minority voters?

8 A Yes, they were.

9 MR. HEARNE: Your Honor, in term of whether the  
10 General Assembly was made aware, he's not talking about  
11 any specific article, any specific person. I think that's  
12 speculative.

13 THE COURT: I'll sustain the form of the answer.  
14 I'll take it to mean that there was information publicly  
15 available.

16 DR. LICHTMAN: No, Your Honor.

17 THE COURT: Pardon?

18 DR. LICHTMAN: What I meant was we have evidence from  
19 the Court -- the Cortes' deposition that he was working  
20 for the Advancement Project at the time, and the  
21 Advancement Project specifically communicated with members  
22 of the General Assembly their findings that voter ID laws  
23 discriminate.

24 THE COURT: They were advised of it.

25 All right. Let's move on.

1 BY MR. SPIVA:

2 Q And were there studies that were publically available  
3 about the documented racial disparities in the possession  
4 of the most commonly available forms of photo  
5 identification?

6 A Yes. Of course there were well-known national  
7 studies, but there were also Virginia-specific studies.

8 Q Okay.

9 MR. SPIVA: And can we put up Table 10. I believe  
10 it's from Dr. Lichtman's initial report.

11 BY MR. SPIVA:

12 Q And first of all, can you cite to any such studies  
13 you just mentioned, Dr. Lichtman?

14 A The Brennan Center had produced a number of studies  
15 nationally, national studies, on disparate rates of  
16 possession. And there were also studies available from  
17 the survey of the Performance of American Elections.  
18 Nationally, I've pulled out this study specifically for  
19 Virginia, but they also had national results showing  
20 similar patterns.

21 Q And can you explain what Table 10 shows?

22 A Yes. The survey of the performance of American  
23 elections is a standard survey of registered voters. And  
24 it samples individual states, as well as accumulates the  
25 samples for the nation. And I have excerpted out that

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1 part of the survey from 2008, so it was available.

2 There's always a gap, a time gap, between when these  
3 surveys are done and when they were produced. So this was  
4 available at the time of the adoption of SB1256.

5 And I've looked at whites and blacks in terms of  
6 their possession -- and this question was asked in the  
7 survey - that's why it's useful - of the two most common  
8 forms of photo voter ID. And that is, Your Honor,  
9 driver's licenses and U.S. passports. And as you can see,  
10 this Virginia-specific data shows substantial racial  
11 disparities in the possession of these two forms of  
12 identification.

13 With respect to driver's licenses, 98.1% of whites  
14 reported possessing them, and 84.6% of blacks. A  
15 difference of 13.5 percentage points. With respect to  
16 U.S. passports, 52.8% of whites reported possessing them,  
17 compared to 19.2% of African-Americans. A difference of  
18 33.6 percentage points.

19 And although the sample sizes are small for blacks,  
20 the magnitude of the difference is great enough so that  
21 these differences are statistically significance at the  
22 very stringent .01 level in social science. That means  
23 the likelihood of obtaining these differences merely by  
24 chance or random processes are very, very small. So  
25 social scientists could confidently conclude that these

1 differences within Virginia are real.

2 Q Did the information from Virginia enable you to  
3 distinguish the direct impact on race, of racial  
4 disparities, in driver's license and passport possession  
5 as compared to the impact on party?

6 A Yes.

7 MR. SPIVA: If he can turn to Table 10, please.

8 A Yes. I was able to disentangle race and party.

9 MR. SPIVA: Can we turn to Table 11, please.

10 BY MR. SPIVA:

11 Q And if you can explain, Dr. Lichtman.

12 A Yeah. To try to hold party constant, it's not  
13 perfect, but it's a pretty good measure, I looked at Obama  
14 voters only to see if in fact there were racial  
15 distinctions between whites and blacks among Democratic  
16 voters in 2008, the year that this survey was taken. And  
17 what I found was that there were comparable differences by  
18 race, even among Obama voters. And that these differences  
19 remained statistically significant at standard levels  
20 within social science.

21 So the purpose of this was to see whether the effect  
22 on the most common forms of ID operated by race or  
23 directly by party. And this shows, even though the law is  
24 obviously racially neutral on its face, that the political  
25 derivations of the law stem from the impact of the law on

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1 blacks versus whites. It's similar to the old poll tax.

2 And the old poll tax was racially neutral on its  
3 face. It was justified by preventing voter fraud and  
4 other measures. The players were reversed. It was the  
5 Democrats in those days who benefited it. And they  
6 benefited from it by impacting the votes of  
7 African-Americans who were the base of the Republican  
8 party. And that's who was targeted in the poll tax.

9 It gained political benefits for Democrats through  
10 its impact on race, and that's similar to what's going on  
11 here. I'm not comparing the two measures. I'm just  
12 showing how they operate.

13 Q Was there also evidence available at the time of the  
14 enactment of SB1256 regarding the disparities by age in  
15 license and passport possession?

16 MR. SPIVA: And if we can turn to Table 12, please.

17 A Yes. Same survey also available. You get a little  
18 bit different pattern with respect to age. Remember, age  
19 was not nearly as significant a political determinate as  
20 race.

21 With respect to the possession of passports, there  
22 was no significant difference between the age groups. But  
23 with possession of driver's licenses, not surprisingly,  
24 there is a difference that is statistically significant.  
25 And it is about 10.7 percentage points. The older

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1 registered voters are more likely to possess driver's  
2 licenses than the younger register voters.

3 Q Was there evidence at the time regarding racial  
4 disparities in employer photo IDs?

5 A Yes. And that gets a little trickier because these  
6 are people who say we have driver's licenses or say we  
7 have passports.

8 When you're turning to employer IDs, Your Honor, we  
9 know who's employed, but we don't know if they have  
10 picture IDs. But we know a few things. And on balance,  
11 it's not a huge racial difference there. We know that  
12 African-Americans are much more likely to be unemployed  
13 than whites. About double the unemployment rate. So  
14 whites are much more likely to be employed, and even have  
15 the option to obtain picture employment IDs.

16 We also know that by about three percentage points,  
17 whites lead African-Americans in private employment. But  
18 by about one or two percentage points, African-Americans  
19 lead whites in government employment. Whites are more  
20 likely to be in the private sector. African-Americans are  
21 more likely to be in the government sector. But overall,  
22 African-Americans are more likely to be unemployed. So  
23 it's a close balance that probably tips towards whites,  
24 but it's hard to say without knowing what employees have  
25 IDs.

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1 THE COURT: Next question.

2 Q Was there evidence at the time of the enactment of  
3 SB1256 regarding racial disparities and student and  
4 veteran's IDs?

5 A Yeah. Again, we don't know actually who has student  
6 IDs. And student IDs have very stringent requirements  
7 that universities may not have, like expiration dates.  
8 But African-Americans are slightly more likely to be  
9 enrolled in institutions of higher learning, and whites  
10 are slightly more likely to be veterans. So these other  
11 IDs, the balance are close. But on the most common forms  
12 of ID, the balance is very wide towards whites as opposed  
13 to blacks.

14 Q Let me shift again, did you do any assessment of the  
15 budget that was included for SB1256 for voter education  
16 and outreach?

17 A I did.

18 Q And what did you conclude regarding that?

19 A As I point out in my report, the budget was about  
20 \$200,000 per year through 2017. We don't know what the  
21 budget might be after that, or if there is going to be any  
22 budget after that. For a big state like Virginia, where  
23 you've got 5,000,000 plus registered voters, that's a  
24 very, very miniscule budget.

25 THE COURT: What was that number again, Doctor?

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1 DR. LICHTMAN: \$200,000 per year through 2017, Your  
2 Honor.

3 THE COURT: Thank you, sir.

4 DR. LICHTMAN: And that's less than a nickel per  
5 registered voter. And I read in the depositions of the  
6 spokespersons for the Board and the Department of  
7 Elections that they did not believe the budget was  
8 adequate.

9 BY MR. SPIVA:

10 Q According to the latest information available to you,  
11 how many free voter ID cards had Virginia issued?

12 A I think that's in my report.

13 THE COURT: During what time period?

14 MR. SPIVA: I've said the latest available to him,  
15 but I think it is in his report.

16 DR. LICHTMAN: I have it. It's through September 24,  
17 2015, Your Honor. And it was 4,622.

18 THE COURT: Okay. And that's through September 2014?

19 DR. LICHTMAN: No. September 2015.

20 THE COURT: Thank you, sir.

21 BY MR. SPIVA:

22 Q Dr. Lichtman, is there evidence from other states  
23 relevant to the motivations behind the adoption of SB1256?

24 A Yes. An historian would look at the bigger picture  
25 and the bigger context to see if Virginia is somehow not

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1 consistent with national trends and what is going on in  
2 other states.

3 MR. SPIVA: Can we put up Chart 11 from  
4 Dr. Lichtman's initial report.

5 BY MR. SPIVA:

6 Q And what did you find?

7 A Yeah. This is exit polls looking at the white share  
8 of voters from the voter turnout from the United States  
9 election project. And it's the white component of voters.  
10 And I don't have to dwell on this chart a great deal. But  
11 the reason you see the sawtooth pattern is, obviously,  
12 turnout differs in midterms and in presidential elections.  
13 But whether you isolate the midterms going from '02 to '06  
14 to '10 to '14, you can see the trend is downward. And the  
15 same thing if you isolate the presidential elections.

16 In other words, the pattern of declining white  
17 components of voters that we saw in Virginia is not an  
18 atypical pattern. It is a typical pattern across the  
19 United States over more than a decade of time.

20 MR. SPIVA: And if we can put up Table 13 from Page  
21 37 of Dr. Lichtman's --

22 DR. LICHTMAN: If you can wipe out those lines. I  
23 don't know how to do it. Maybe I can. Wait a minute.  
24 No. It just makes it worse. There we go.

25 BY MR. SPIVA:

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1 Q And how does Table 13 play into your analysis,  
2 Dr. Lichtman?

3 A Well, Table 12 was the replication of the Virginia  
4 data for turnout.

5 Q Did you want me to put that up?

6 A This is the replication of the Virginia data  
7 nationwide from exit polls for voting. And you see almost  
8 identical patterns nationwide that we saw in Virginia.  
9 That is, the political base of the Republican Party is  
10 white voters at 57%. Again, black voters only giving up  
11 very minimal support to Republican candidates at about 7%.

12 That same, about, 50 percentage point gap between  
13 white and black support for Republican candidates. And a  
14 very close pattern as well for Hispanic, Asians, and  
15 others that we see in Virginia. Maybe a little less of a  
16 gap, but pretty close in the low 20s as opposed to the mid  
17 and higher 20s. So what this shows is that Republicans  
18 benefit from the votes of whites, and do not benefit from  
19 the votes of blacks, Hispanics, Asians, and others,  
20 nationwide.

21 MR. SPIVA: And if we could turn to Table 14, which I  
22 believe is -- it's on Page 38 of his initial report.

23 BY MR. SPIVA:

24 Q And what does that show?

25 A We are now looking at, in light of our findings, are

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1 these findings sustained? That is the declining pattern  
2 of white turnout, the racial polarization? Has there been  
3 a response to this, not just in Virginia, but nationwide,  
4 in terms of Republican dominated governments adopting  
5 photo voter ID laws?

6 And this table looks at the adoption of photo voter  
7 ID laws after the 2008 presidential election. And there  
8 are 14 states. Ten had straightforward Republican  
9 control. In two of them, although there wasn't statewide  
10 Republican control, Republicans were still able to adopt  
11 photo ID laws by overriding the votes of -- veto, rather,  
12 of a Democratic governor. So that's 12 of 14 either  
13 straightforwardly adopted by Republicans, or adopted by  
14 Republicans by overriding a Democratic veto.

15 In a 13th state, Mississippi, voters enacted the  
16 voter photo ID law in a statewide referendum. That leaves  
17 only one state, and that's the State of Rhode Island. A  
18 very small state where a voter photo ID law was passed  
19 when you had a Democratic state legislator and an  
20 independent Governor.

21 But overwhelmingly since Barack Obama's victory in  
22 2008, there has been a clear partisan pattern consistent  
23 with the Virginia pattern of adoption voter photo ID laws.

24 THE COURT: Now, was the voter ID law in these 14  
25 states identical, or at least similar, to the one in

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1 Virginia?

2 DR. LICHTMAN: They are by no means identical. Some  
3 are similar, some are not entirely similar. North  
4 Carolina --

5 THE COURT: I don't need you to go on. I just wanted  
6 to ask the question.

7 DR. LICHTMAN: Sure.

8 THE COURT: Next question.

9 MR. SPIVA: Yes, Your Honor.

10 BY MR. SPIVA:

11 Q Do the provisions of SB1256, and the interpretation  
12 by the State Board of Elections, create issues regarding  
13 voter confusion?

14 A I think they do. I think, you know, Your Honor was  
15 asking me about the Virginia law compared to other state's  
16 laws. I think the Virginia law is the most confusing of  
17 all voter ID laws in the nation.

18 THE COURT: Why?

19 DR. LICHTMAN: I sketched this out in my report, and  
20 raised the issues, and cite sources for this.

21 MR. SPIVA: Can we go to Page 40 of Dr. Lichtman's  
22 report.

23 THE COURT: Are you talking about Plaintiffs' 212?

24 MR. SPIVA: Yes, Your Honor.

25 THE COURT: Page 40?

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1 MR. SPIVA: Yes.

2 THE COURT: Okay. I'll take a look at it.

3 BY MR. SPIVA:

4 Q And what conclusions did you draw there,  
5 Dr. Lichtman?

6 A Well, these questions were drawn out of e-mails from  
7 election officials - and I cite them in my report - in the  
8 State of Virginia who are even among themselves having  
9 difficulty figuring out exactly what voter IDs count and  
10 what don't.

11 And the first couple derived from this whole issue of  
12 certain kinds of IDs have to be valid, but other kinds of  
13 IDs don't have to be valid. And so there's the question  
14 of which IDs are unacceptable if they're expired. In this  
15 case, expired by more than a year. So that also raises  
16 for the voter the question what is the length of the  
17 expiration period.

18 There are issues with respect to revoked, suspended,  
19 or canceled driver's licenses. As far as I know, the law  
20 does not address that. Can a voter use a learner's  
21 permit? What counts as a valid employer ID? Can an ID be  
22 used if it does not contain an expiration date? Can  
23 voters use a government issued ID that's not on the list  
24 of authorized IDs? Must the voter's name on the ID match  
25 the voter's name on the registration roles? Must the ID

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1 contain an address? And must this address be current?

2       These aren't necessarily every issue raised by the  
3 various distinctions among the IDs, but these are the  
4 issues that I parsed out by looking at communications  
5 among election officials themselves in Virginia.

6 Q       And did you consider anything from the deposition  
7 testimony of Mr. Alcorn who was the representative of the  
8 State Board of Elections?

9 A       I did. I recall that he made some comments about  
10 voter confusion. I'd have to see it to --

11       MR. SPIVA: I guess I can put it up to refresh his  
12 recollection, Your Honor?

13       THE COURT: Yes, sir.

14       MR. SPIVA: If we can put up Page 83 of Mr. Alcorn's  
15 deposition.

16 BY MR. SPIVA:

17 Q       If you can take a look at that, and see if it  
18 refreshes your recollection, Dr. Lichtman.

19 A       Yep. It shows a concrete example. I did recollect  
20 this. A concrete example from the City of Richmond.  
21 Right here, I guess.

22       And election officials demanded an additional ID,  
23 even when they were presented with an acceptable ID. This  
24 was errors made by election officials themselves. And the  
25 deponent indicates that this was accurate as far as he can

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1 tell. So this puts some flesh and blood on this issue of  
2 confusion that can even affect election officials  
3 themselves.

4 Q And why is voter confusion important?

5 A Because studies have shown that voter confusion can  
6 be one of the most important influences of a voter photo  
7 ID law in deterring people from showing up at the polls.  
8 And I cite a specific study in my report from the State of  
9 Texas that directly addresses this issue of, A, does voter  
10 confusion deter voters. And, B, what is its magnitude.

11 And this is a study in 2014, a recent study, in  
12 Congressional District 23. A majority Hispanic district.  
13 Very competitive. One of the few competitive districts in  
14 Texas. And it found that in looking at non-voters, 5.8%  
15 gave as their principal reason for not voting the lack of  
16 an acceptable ID. And 12.8 cited it as one reason for not  
17 voting.

18 But the interesting thing that makes this study  
19 informative was the researchers found that the great  
20 majority of these non-voters who said they weren't voting  
21 because they didn't have acceptable IDs, actually had  
22 acceptable IDs but were simply confused about whether or  
23 not their IDs would be acceptable, so didn't bother to  
24 vote.

25 THE COURT: Okay. Next question.

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1 Q Would this be especially important for minorities,  
2 Dr. Lichtman?

3 A Absolutely. This study found that the impact was  
4 much greater for Hispanic - this is a Hispanic district -  
5 than it was for whites. And when you're dealing with  
6 minorities, turning to African-American's, because that's  
7 our focus, whose educational levels and educational  
8 background and grasp of education is unfortunately lower  
9 than that of whites, it's going to be a particular problem  
10 for minorities, and also for Hispanics if they have  
11 language issues.

12 THE COURT: Next question.

13 Q And did the study reach any conclusions regarding  
14 whether the deterrent affect had any influence on the  
15 outcome of the election?

16 A Well, they said it affected larger numbers of voters.  
17 And while they couldn't prove it turned the election, they  
18 said that it was possible that it did.

19 MR. SPIVA: Your Honor, I'm going to turn to another  
20 topic, and I anticipate an objection, possibly even from  
21 Your Honor. I just want to explain what --

22 THE COURT: Pardon me?

23 DR. LICHTMAN: Can I take a quick break?

24 THE COURT: Yes, sir.

25 DR. LICHTMAN: Thank you.

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1 (Witness stood down from the witness stand.)

2 MR. SPIVA: Do you want me to do my explanation now,  
3 or when he gets back?

4 THE COURT: I don't think the witness needs to be  
5 here. You can go ahead and proceed without him.

6 MR. SPIVA: I have just a few questions I want to ask  
7 him about what the legislature did with respect to long  
8 lines. I'm not trying to litigate the long lines claim.

9 THE COURT: We've already been through that so many  
10 times. You know, we only have a finite amount of time for  
11 this case. And this gentleman's testimony is taking far  
12 long than anybody could expect.

13 MR. SPIVA: Well, he's our key witness, Your Honor.

14 THE COURT: I know he is. Fine fellow. Bright as he  
15 can be. But we don't get short answers to anything.

16 So I really think going back into the long lines --  
17 we've already have had three, four, five witnesses that  
18 have gone through it, what are you going to go into now?

19 MR. SPIVA: I'm not going to ask him about whether or  
20 not there were long lines. It's what was the -- he's  
21 looked at the specific legislative history, and is going  
22 to testify that while the legislature, you know, enacted  
23 the voter ID law purportedly in response to a problem of  
24 voter fraud for which there was no proof, they -- there  
25 were undisputed questions of long lines. And when

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1 presented with solutions, potential solutions for those,  
2 rejected all of those. I think it would take about a  
3 minute.

4 THE COURT: I'm not going to allow that.

5 MR. SPIVA: Oaky. Just so it's clear on the record,  
6 I mean, obviously, this is over our objection, Your Honor.

7 THE COURT: Understood.

8 MR. SPIVA: But we understand your ruling.

9 (Witness has returned to the witness stand.)

10 THE COURT: Okay, Mr. Spiva, go right ahead.

11 MR. SPIVA: Thank you, Your Honor.

12 BY MR. SPIVA:

13 Q Dr. Lichtman, I'm going to turn to a different topic.  
14 Is there any relationship between voter ID laws and voter  
15 confidence?

16 A If anything, there is a negative relationship. It  
17 may seem counterintuitive, but there is either no  
18 relationship or a negative relationship.

19 Q And were there any studies available at the time that  
20 SB1256 was enacted that supports that conclusion?

21 A Yes. There was a study by Professor Ansolabehere,  
22 which was available at the time, which looked at the  
23 relationship between voter ID laws and voter confidence,  
24 and found no relationship. I also used data available at  
25 the time to do my own analysis.

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1 MR. SPIVA: Can we put up Page 58 of his initial  
2 report, please.

3 BY MR. SPIVA:

4 Q And first of all, Dr. Lichtman, does Page 58 reflect  
5 either Dr. Ansolabehere's study or your own analysis?

6 A Well, this is Dr. Ansolabehere's conclusion where he  
7 says, *"The use of photo ID requirements, bears little*  
8 *correlation to the public's beliefs about the incidents of*  
9 *fraud. The possible relation of such beliefs to*  
10 *participation appears even more tenuous. This lack of*  
11 *empirical support leads us to conclude that at least in*  
12 *the context of current American election practices and*  
13 *procedures, public perceptions do not provide a firm*  
14 *justification for voter identification laws."*

15 And that's a study by Ansolabehere personally, and  
16 the Harvard Law Review, from 2008. So it was available.

17 Q And you said that you had also conducted your own  
18 analysis?

19 A Yes.

20 Q And what did you find?

21 A What I found was if you looked at confidence on the  
22 part of voters, that the voters in their community,  
23 county, city would be counted. And you compared states  
24 with strict photo voter ID laws to other states, in seven  
25 out of eight instances, including Virginia, voters were

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1 less confident in the voter photo strict ID states than in  
2 the rest of the states. And that seven out of eight was  
3 strategically significant. I also posited reasons for  
4 this. It wasn't just a random affect.

5 Q And what were those reasons?

6 A The reason I explained, in my view, was in these  
7 states you're getting a constant drumbeat - rightly or  
8 wrongly, it's politics - of voter fraud. The need to  
9 protect the integrity of the ballot, big problems with  
10 fraud. And that's going to affect public perceptions in  
11 those states as compared to other states where that's not  
12 made an issue. So it's kind of a self non-fulfilling  
13 prophecy.

14 Q Did contemporary statements by legislators, and  
15 others in Virginia, indicate a need to switch from the  
16 2012 voter ID law to the 2013 law in order to promote  
17 voter confidence in the integrity of the electoral system?

18 A They did. That was a major point of persuasion here  
19 in Virginia, as it was in all the states that I've looked  
20 at with respect to voter ID. This idea of public  
21 confidence in elections is a very central argument.

22 Q Did legislators cite the report of the Carter-Baker  
23 Commission on electoral reform to justify enactment of  
24 SB1256?

25 A They did.

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1 Q And are you familiar with the Carter-Baker  
2 Commission?

3 A I'm extremely familiar. The Carter-Baker Commission  
4 was housed at my institution, The American University. It  
5 was directed by the, unfortunately, now late Robert  
6 Pastor, who was my cousin by marriage. I sat in on  
7 academic advisory meetings of the Carter-Baker Commission  
8 and discussed the Commission extensively with Professor  
9 Pastor.

10 Q And what did you learn?

11 A I learned that the Carter-Baker Commission, not  
12 surprisingly, given that, you know, a very eminent  
13 Republican in Secretary Baker and a very eminent Democrat  
14 in President Carter, was a compromise. That Secretary  
15 Baker wanted a recommendation for photo ID, and President  
16 Carter wanted recommendations for expanding access to the  
17 ballot. And that's why you have both of those elements in  
18 the Carter-Baker Commission report.

19 And I also cited a later joint op-ed written by both  
20 Baker and Carter, which indicated we both needed ballot  
21 security, and at the same time doing what you can to open  
22 access. So that's the nexus. And you couldn't pull apart  
23 one from the other, because that's the very nature of the  
24 compromise.

25 Q Did backers of SB1256 also cite the Georgia voter ID

1 legislation as a model?

2 A They did.

3 Q And did they follow this model?

4 A No. As we saw, we talked about with respect to  
5 expirations, they did not follow the Georgia model. The  
6 Georgia model is much simpler, much less confusing than  
7 the model in the State of Virginia. They didn't totally  
8 tear up the Georgia, but in fundamental ways that  
9 critically affect people's voting, they departed from the  
10 Georgia model. And I talked about that, I think, in my  
11 initial report.

12 Q Did backers of SB1256 make the common sense argument  
13 that it brings identification for voting in line with  
14 photo ID requirements for such activities like receiving  
15 Social Security, Medicare, Medicaid, et cetera?

16 A Yes. You often get that common sense requirement --  
17 that common sense argument. And we got it here.

18 Q And what is your analysis of that?

19 A I'm not going to go through all the details of my  
20 analysis, but I showed that none of those examples hold.  
21 That you can get Social Security, you can get Medicare,  
22 you can get Medicaid without having to have a photo ID.  
23 In other words, not strict. And that you can get many,  
24 many forms of prescriptions in the State of Virginia  
25 without having a photo ID as well.

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1 Q I'd like to now turn to your analysis of the Senate  
2 Factors. And I think with respect to some of them you've  
3 already discussed, but if you can just tell me I've  
4 already discussed this so we can move on to the next one.

5 What is Senate Factor 1, and what did you find?

6 A We already discussed that. That's history of  
7 discrimination.

8 Q Okay. And Senate Factor 2, is that the extent to  
9 which voting, and the elections of the state or political  
10 subdivisions, is racially polarized?

11 A Already discussed and laid out in my tables.

12 Q And Senate Factor 3 is the extent to which the state  
13 or political subdivision has used unusually large election  
14 districts, majority vote requirements, anti-single shot  
15 provisions, or other voting practices or procedures that  
16 may enhance the opportunity for discrimination against the  
17 minority group.

18 A That we haven't discussed.

19 Q And have you looked at that?

20 A Yes. And what I found is on Page 61 of my report is  
21 that Virginia was one of only 14 states that offered  
22 voters neither early voting, nor no excuse absentee  
23 balloting. That Virginia has one of the worst records in  
24 the nation when it comes to the duration of waiting times  
25 at the poll, both in the general election of 2008 and

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1 2012. It was among the five states with the longest  
2 waiting times at the polls. I mean, very significant for  
3 voters. And that the waiting times at the polls --

4 Q Dr. Lichtman, I should tell you that while you were  
5 out, His Honor said we should move on from the long lines  
6 or waiting times. So if you can maybe, you know, focus on  
7 the other part of your findings.

8 You made a finding with respect to long lines, I take  
9 it?

10 A One more point. A study by the Center for American  
11 Progress found that Virginia ranked sixth from the bottom  
12 among all states in access to voting. This is a liberal  
13 leaning think tank, you know, but they have a list of  
14 objective criteria. And, you know, Democratic states also  
15 get grades of a D or F.

16 MR. SPIVA: Let me ask you, Ms. Schultz, to put up  
17 Table 18 on Page 50 of Dr. Lichtman's report.

18 BY MR. SPIVA:

19 Q And let me ask you, what is Senate Factor 5, and what  
20 did you find?

21 A Senate Factor 5 is the extent to which members of the  
22 minority group of the state bear the effects of  
23 discrimination in areas such as education.

24 MR. SPIVA: I'm sorry. We can take the table down.  
25 I got my notes mixed up.

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1 A That was the table I referred to previously.

2 Q So going back to Senate Factor 5, if you can tell us  
3 what that is and what you found.

4 A We've already discussed that. That's disparities in  
5 such things as education, employment, health, and others.

6 Q Okay. And then Senate Factor 6, what is that, and  
7 what did you find?

8 A Yeah. That's whether political campaigns have been  
9 characterized by overt or subtle racial appeals. And I  
10 found three recent examples of racial appeals, racial  
11 slurs, or however you want to put it. One is pretty  
12 well-known. And it's detailed specifically in my report  
13 with quotations on Page 61. And that's in the 2006  
14 campaign for U.S. Senate, Republican candidate, and former  
15 Governor, George Allen, called a volunteer for Democrats  
16 of east Indian descent, macaca, and kind of repeated this  
17 slur.

18 I also found other examples. I found in Loudon  
19 County five years later on Halloween of 2001, the  
20 Republican Party of --

21 Q You said 2001. Did you mean 2011?

22 A I'm sorry, 2011. It's getting late. Circulated by  
23 e-mail a photomontage showing President Barack Obama with  
24 a bullet in his head. And Obama supporters as grotesque  
25 zombie figures. This was even condemned by the Republican

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1 Party. But even after that, and even after the macaca  
2 incident in the run-up to the 2012 election, the  
3 Republican Party of Mecklenburg, Virginia posted on its  
4 Facebook, images of Obama as a witch doctor, a cave man,  
5 and a thug.

6 MR. SPIVA: Can you put up Page 63 from  
7 Dr. Lichtman's report.

8 BY MR. SPIVA:

9 Q Is this the image you were referring to from the  
10 Loudon County --

11 A Yes. I couldn't find the image from Mecklenburg  
12 County, but I did find the image from Loudon County. I  
13 think it speaks for itself. I don't need to comment.

14 MR. SPIVA: We can take that down.

15 BY MR. SPIVA:

16 Q What is Senate Factor 7, and what did you find?

17 A The extent to which members of the minority group, in  
18 this case we're looking at African-Americans, Your Honor,  
19 have been elected to public office. And of course we know  
20 that no African-American has been elected statewide since  
21 Doug Wilder, which made headlines back in 1989. I don't  
22 think there's even been much nomination by either party.  
23 I don't know if the Democrats have nominated anyone  
24 statewide. Republicans may have nominated one or two, but  
25 no one has been elected.

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1 And African-Americans are substantially  
2 underrepresented in the General Assembly. They are about  
3 13% of both the State House and the Senate, which is just  
4 64% of their percentage in the citizen voting age  
5 population. This is a shortfall of three State Senate  
6 seats, and seven State House seats.

7 I also looked at data compiled by the American Bar  
8 Association. They have a national database of judicial  
9 diversities. And for the courts they looked at - it  
10 wasn't Federal Courts, Your Honor - African-Americans  
11 comprised 10.7% of judges. 56% of their citizen voting  
12 age population. The equivalent of a shortfall of 15  
13 judgeships. So certainly that Senate Factor applies.

14 Q And what is Senate Factor 8, and what did you find?

15 A The report says these last two Senate Factors are  
16 still relevant, but not as relevant as the first seven,  
17 but I still analyzed them. Factor 8 is whether there is a  
18 significant lack of responsiveness on the part of elected  
19 officials to the particularized needs of the minority  
20 group.

21 And I mention here many, many years of advocacy by  
22 the NAACP, and no response -- I don't think I can talk  
23 about waiting times, but maybe in this context, the issue  
24 of waiting times.

25 And another critical issue for African-Americans in

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1 Virginia is the expansion of Medicaid. We saw the great  
2 disparity between African-Americans and whites in  
3 insurance coverage in health. And that includes all kinds  
4 of health coverage. And African-Americans would  
5 particularly benefit from Medicaid expansion.

6 I cite a study by the Kaiser Foundation which  
7 indicates that of more than 500,000 uninsured Virginians  
8 in 2011 who would be eligible for Medicaid expansion, 28%  
9 are African-Americans. Much higher than the 19, or so,  
10 percent of Virginia adults that are African-American.

11 And the Virginia General Assembly has consistently  
12 blocked Medicaid expansion, which would have benefits for  
13 African-Americans. And has been a particular point of  
14 advocacy by African-American groups, not just in Virginia,  
15 but across the nation, obviously.

16 MR. SPIVA: Would you please put up Table 19 on Page  
17 65 of his initial report.

18 BY MR. SPIVA:

19 Q Did you find some relationship between the states  
20 that had not expanded Medicaid under the Affordable Care  
21 Act as of November 2015, and the adoption -- and those  
22 that adopted voter photo ID laws?

23 A Yes. There is a remarkably strong correlation,  
24 although the great majority of states don't have photo  
25 voter ID laws. The great majority of states that have not

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1 expanded Medicaid have, in fact, adopted photo voter ID  
2 laws. So the same political dynamics that we see with  
3 respect to Medicaid expansion, as indicated by this table,  
4 also applies to the adopting of voter photo ID laws.

5 Q And what, finally, what is Senate Factor 9, and what  
6 did you find?

7 A Whether the policy underlying the state or political  
8 subdivision's use of such voting qualification,  
9 prerequisite to voting, or standard practice or procedure  
10 is tenuous. And I'm not going to repeat my discussion of  
11 the rationales, which I think are contextual, and the lack  
12 of voter fraud and the lack of relationship to voter  
13 confidence.

14 Q I'd like to now turn your attention to the reports of  
15 the defendants' experts, which you analyzed in your  
16 rebuttal report. First, considering Dr. Owen's report.  
17 Does the Owen report indicate that it is not appropriate  
18 for a social scientist to analyze the intent behind  
19 legislation?

20 A No. Quite to the contrary. And I found this very  
21 interesting, because I hadn't seen it before. The Owen  
22 report directly engages the issue of intent. It quotes an  
23 authority, John Kingdon, on intent analysis, and offers an  
24 alternative explanation to discriminatory intent.

25 Q And what is that explanation that Dr. Owen offers?

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1 A The explanation that Dr. Owen offers is that the  
2 adoption of photo voter ID law in Virginia was a response  
3 to public opinion as opposed to a calculation of political  
4 advantage on the part of decision-makers.

5 Q And is this explanation -- in offering this  
6 explanation, does she follow standard methodology  
7 according to historical practice, or the Arlington Heights  
8 guideline?

9 A Not at all. It was a very abbreviated discussion of  
10 this alternative explanation. She does not examine the  
11 history or current manifestation of discrimination in  
12 Virginia. She does not follow the sequence of events, or  
13 the bigger political picture, related to the adoption of  
14 SB1256. She does not examine the contemporary statements  
15 of decision-makers. And so the whole extended analysis  
16 that you would need to prove intent, although she engages  
17 intent, is not present here.

18 Q Do you find other problems with her explanation?

19 A Yes, I found numerous other problems with her  
20 explanation.

21 Q And what were those?

22 A First of all, to connect public opinion with policy,  
23 she quotes an authority, John Kingdon, saying government  
24 officials may make some rather general judgments about the  
25 state of public opinion that affects policy agendas. Then

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1 there's an ellipsis, and the quote goes on to say, "*There*  
2 *might be instances in which they feel the public at large*  
3 *virtually directs them to pursue a course of action.*"

4 But the ellipses actually contains something very  
5 important that's left out here. Kingdon says "*at most*  
6 *there might be instances.*"

7 And further, this is not in Dr. Owen's report, but it  
8 is in Kingdon's book, he found in his case studies of  
9 policy, general public opinion is important only in 26%.  
10 It's a very small minority. He also points out, and this  
11 is not present in her compilations from Dr. Kingdon, that  
12 the issue is much more likely to prevent government  
13 action, even in the few cases where it works, rather than  
14 prompt government action. He says, quote, "*Public opinion*  
15 *may sometimes direct government action to do something,*  
16 *but it more often constrains government from doing*  
17 *something.*"

18 He concludes that, quote, "*Public opinion acts more*  
19 *as a constraint on what is possible, than as a promoter of*  
20 *a particular item.*" Finally, he points out that the  
21 public has to thrust the issue to make it part of the  
22 agenda for vote-seeking politicians.

23 And Dr. Owen presents no evidence to demonstrate that  
24 even a small number of Virginians are sufficiently  
25 interested in the issue of photo voter ID. Remember,

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1 there was non-photo law already existing to make it a  
2 voting issue to make what we call a "*salient issue*". So  
3 that's the conceptual problem. There are also very  
4 particular problems with it.

5 Q She cites a Quinnipiac University poll. Are there  
6 problems with her explanation in that regard?

7 A Yes. The only Virginia-specific evidence that  
8 Dr. Owen cites in support of her proposition that it was  
9 public opinion that promoted the adoption of SB1256, is a  
10 Quinnipiac opinion poll issued on February 21, 2013. I  
11 don't dispute that the poll shows strong public support  
12 for photo voter ID, but this poll, the only specific  
13 Virginia evidence she supplied, cannot possibly explain  
14 SB1256 because it was issued after SB1256 was introduced,  
15 and after SB1256 passed the House and passed the Senate in  
16 Virginia.

17 THE COURT: Okay. Next question.

18 Q And are there other problems with Dr. Owen's  
19 analysis?

20 A Yes. Sticking to the same poll, if the argument is  
21 that it's public opinion that prompts response, there's  
22 another issue equally strongly supported by the public,  
23 and that is the automatic enfranchisement of former  
24 felons. The numbers are almost identical, and yet the  
25 same -- in the same legislative session that they adopted

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1 SB1256, a Republican-dominated subcommittee killed by  
2 voice vote SJ266, which was an amendment to restore voting  
3 rights to just nonviolent former felons.

4 She also cites another survey, which is a SurveyUSA  
5 Poll taken in April of 2013. I'm very familiar with this  
6 poll because it was actually taken in the neighboring  
7 state of North Carolina. But Dr. Owen cites it as  
8 applicable to Virginia.

9 And, again, yes, it does show substantial public  
10 support for photo ID, but there is some very important  
11 other questions in this poll that Dr. Owen does not  
12 disclose that contradict her theory on the enactment of  
13 SB1256, and the substance of SB1256. Specifically, the  
14 survey found that 74% of registered voters agreed that  
15 *"legislators should show evidence of significant problems,*  
16 *such as real voter fraud, before they pass laws that make*  
17 *voting more difficult."*

18 The poll also found that 66% of registered voters,  
19 quote, *"Would allow persons to vote if they signed an*  
20 *affidavit of identity under penalty of perjury."* That's  
21 what they could do before SB1256, but SB1256 eliminated  
22 that. And again, I didn't conduct that poll.

23 Q I just want to clarify one thing. It was the 2012  
24 law that eliminated the affirmation of identity?

25 A Right. But it was also not in the 2013 law. I might

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1 have been a little unclear about that. That's right. It  
2 existed before the 2012 law.

3 Q And finally with regard to Dr. Owen's analysis, does  
4 she recognize whether public opinion, and discriminatory  
5 intent, could potentially not contradict each other?

6 THE COURT: Could you repeat the question?

7 MR. SPIVA: Yes. I think it was probably an awful  
8 question, Your Honor. Maybe I should just restate it  
9 altogether.

10 THE COURT: If you would. Thank you.

11 BY MR. SPIVA:

12 Q Was there another problem with Dr. Owen's analysis?

13 A Yes. It's certainly possible that the legislators,  
14 although it's not proven since the poll occurred after the  
15 law, could have been sensitive to public opinion on this,  
16 but that by no means contradicts discriminatory intent.

17 To again give the example of the Southern Manifesto. The  
18 key document in opposition to *Brown v. Board of Education*,  
19 and in support of the old Jim Crow south, it's certainly  
20 possible that they were sensitive to the opinions of their  
21 all white constituencies. But quite clearly, the Southern  
22 Manifesto was based on discriminatory intent to maintain a  
23 highly discriminatory system of segregation in Jim Crow.

24 Q Did you consider Dr. Owen's deposition testimony  
25 regarding the example you just gave?

1 A Yes.

2 MR. SPIVA: Can we put up Page 30 of Dr. Owen's  
3 deposition testimony.

4 BY MR. SPIVA:

5 Q And what -- what was your analysis of this testimony?

6 A This doesn't seem to be the right page.

7 MR. SPIVA: We may have the wrong page number. Why  
8 don't I -- why don't we take that down.

9 A I remember it. I remember it. She was asked  
10 actually about literacy tests. Literacy tests was  
11 justified on the grounds of informed voters. Does that  
12 mean it wasn't racially intentionally discriminatory? And  
13 she responded by saying, well, if they said it, that was  
14 it. But I am sure there were other motives involved.

15 In other words, recognizing you can have more than  
16 one motive, including discriminatory intent behind a piece  
17 of legislation, including legislation that is not racially  
18 tinged on its face.

19 Q And did you read Dr. Owen's discussion of a Southern  
20 Manifesto in her deposition?

21 A I did.

22 Q And what was your assessment?

23 A I think maybe we have can put up the --

24 Q Hopefully we have the right page number up. I  
25 believe it's Page 28 of Dr. Owen's deposition.

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1 A I mean, I remember it.

2 Q Does that help to refresh your recollection?

3 A This seems to be, again, about Virginia being -- it's  
4 possible our page numbers don't line up.

5 MR. SPIVA: I have the wrong page number.

6 A But I was surprised to see it. I remember it very  
7 well. I was surprised to see someone who teaches southern  
8 history was unwilling to say that the Southern Manifesto  
9 was clearly a racially intentionally discriminatory  
10 document.

11 Q And was the Southern Manifesto framed in race neutral  
12 terms?

13 A Yes. I mean, politicians who signed it were very  
14 cleaver. They talked about States rights, and they talked  
15 about the encroachment of the Courts. But they certainly  
16 did not put into the Southern Manifesto any racially  
17 discriminatory inflammatory language.

18 THE COURT: Next question.

19 Q Does Dr. Owen attempt to challenge your finding of  
20 declining white turnout relative to minority turnout in  
21 Virginia in recent years?

22 A Not directly. She didn't come up with any  
23 alternative numbers of her own, but she did suggest I was  
24 doing a kind of apples to oranges comparison.

25 Q And what is your assessment of that challenge?

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1 A I don't think it was correct. As you saw, I was  
2 comparing Senate elections to Senate elections. I  
3 compared midterm to midterm, 2006 to 2014. I compared  
4 governor elections to governor elections, 2009 to 2013.  
5 And I compared presidential elections to presidential  
6 elections.

7 Q Does Dr. Owen also claim that photo ID has limited  
8 affect on turnout?

9 A Yes, she does.

10 Q And what does she say about that issue?

11 A Well, she primarily relies upon provisional ballots.  
12 That is, she states there were fewer than 800 no ID  
13 provisional ballots in 2014. And fewer than 450 no ID  
14 provisional ballots in 2015.

15 Q Did you find problems with that analysis?

16 A Yeah. First of all, she didn't provide any source.  
17 And then later, she interprets fewer than 800 as 494.  
18 That's incorrect, as I point out from the documentation  
19 directly on no ID provisional ballots from the Virginia  
20 Department of Elections. The correct number is 773. So  
21 she correctly described it once as fewer than 800, and  
22 then incorrectly described it as 494. And I didn't find  
23 her explanation that 494 is less than 800 particularly  
24 persuasive for that big problem with her analysis.

25 But more broadly, number one, the percentages may be

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1 small, but we're still talking about large numbers of  
2 voters. And moreover, these statistics cover only a  
3 midterm and an off year election. Both Dr. Owen and  
4 another expert for defendants, Dr. Palazzolo, acknowledge  
5 that the electorate is very different in midterm and off  
6 year elections than it is in presidential years. More  
7 engaged, more experience. The kind of voters who would be  
8 less likely to be impacted by voter photo ID, as well as  
9 much lower turnout.

10 So I did some examination comparing presidential and  
11 midterm years in terms of no ID provisional ballot.

12 MR. SPIVA: Can we put up Table 1 from the reply  
13 report, please, which is Plaintiffs' 215.

14 BY MR. SPIVA:

15 Q And what was your analysis? Can you explain what it  
16 shows?

17 A In 2012, a high turnout presidential year, we did not  
18 have a photo voter ID law in effect. We had a non-photo  
19 voter ID law in effect.

20 In 2014, a much lower turnout election, we did have  
21 SB1256. And despite the tail off in turnout, you had a  
22 42% increase in no ID provisional ballots cast, indicating  
23 the affects of moving from a non-photo to a photo ID. And  
24 I specify this more precisely in the next table.

25 MR. SPIVA: Can we turn to -- not turn, but bring up

1 Table 2.

2 A Table 2 looks at, again, 2012 when you didn't have a  
3 photo ID law in effect. And it looks at the no ID  
4 provisional ballots as a percentage of provisional ballots  
5 cast. There can be lots of other reasons besides not  
6 having an acceptable ID why you might have to cast a  
7 provisional ballot.

8 And the no ID provisional ballots in this  
9 presidential year were just 5% of all provisional ballots.  
10 But when you got to the non-presidential year, after the  
11 adopting of SB1256, the number of all provisional ballots  
12 drastically drops, whereas the number of no ID provisional  
13 ballots rises. And so the no ID provisional ballots are  
14 now 21.3% of all provisional ballots, or four times what  
15 they were in 2012.

16 So if you got the same 11,000, or so, provisional  
17 ballots in 2016, you might expect well over 2,000 no ID  
18 provisional ballots the next time around.

19 Q Are there other problems with her analysis of the  
20 turnout implications of voter photo ID?

21 A Yes. I think there's a much bigger problem than the  
22 issues with provisional ballots, and that is it's  
23 well-known that provisional ballots are only the tip of  
24 iceberg when it comes to the deterrent affects of voter  
25 photo ID laws. Much more significant are those who don't

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1 show up either because they don't have acceptable IDs, or  
2 as we saw in the Texas case, that they don't believe they  
3 have acceptable photo IDs. And we saw that could  
4 implicate as many as 20,000 votes in just one  
5 congressional district. It could implicate well over  
6 100,000 votes in an entire state like Virginia, or even  
7 more.

8 Q And is there another issue with Dr. Owen's analysis  
9 of the provisional ballot corrected?

10 A Yes. She doesn't take into account the voters who  
11 might just have walked away rather than cast a provisional  
12 ballot. And rather than discussing the turnout  
13 implications of photo voter ID using recent on-point  
14 studies, like the Texas study, she cites older,  
15 non-germane studies. She cites, for example, a finding  
16 from an 8 to 10-year old study which shows that a lack of  
17 voter ID accounted for only a small fraction of  
18 non-voters. But that covered only the 2016 midterms and  
19 the 2008 primaries. I didn't include a presidential.

20 And at the time of the 2006 midterms, only one state  
21 had strict photo ID - Indiana. And at the time of the  
22 2008 primaries, only two states had this.

23 Moreover, the studies -- the surveys on which she  
24 relied way back then have now been updated. We now have  
25 the 2014 post-SB1256 survey of the Performance of American

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1 Elections which asks voters whether lack of identification  
2 was a major or a minor factor in not voting. And  
3 nationwide, 4.5% of non-voters, a very large percentage,  
4 cited the lack of ID as a major factor for not voting.

5 The authors of the study projected this nationwide,  
6 and found 3.1 million lost votes nationwide because  
7 voters, rightly or wrongly, believe they didn't have the  
8 acceptable ID. And this was with still a lot of states,  
9 like Maryland, not having any ID laws at all.

10 The survey also found substantial racial disparities  
11 between whites and blacks, with blacks much more likely to  
12 cite a lack of ID as a reason for not voting than whites.  
13 And it also found even greater disparities when you looked  
14 at states with strict voter IDs.

15 There's also Virginia specific information. Small  
16 sample. It's not statistically significant. But in  
17 Virginia, 7.9% of non-voters cited the lack of an  
18 acceptable ID as a major factor. Projected to all  
19 non-voters, again, you're talking about very, very large  
20 numbers. Even if you projected the lower 4.5% nationwide  
21 finding, you'd be talking about very large numbers of  
22 non-voters.

23 And so these updated studies show 3.1 million voters  
24 nationwide, and we don't know how many in Virginia, but  
25 it's many tens of thousands likely, and it may be over

1 100,000.

2 Q Does Dr. Owen also cite a Pew 2007 survey?

3 A She does.

4 Q Do you have issues with her analysis of this study?

5 A The Pew Study indicates that 98% of registered voters  
6 told the Pew survey takers that they are confident that  
7 they possess the IDs needed to vote in their state. But  
8 that's nationwide. It doesn't limit it to those with  
9 states with strict voter IDs.

10 THE COURT: What was that percentage again, Doctor?

11 DR. LICHTMAN: It's 98%.

12 A It was 98% in response to the Pew 2012 study before  
13 the election - this is September of 2012 - were confident  
14 they had the IDs needed to vote in their state. But at  
15 that time, only four states had strict, and relatively  
16 small states - Georgia, Indiana, Kansas, and Tennessee -  
17 had strict photo identification requirements in effect.  
18 So it doesn't tap into confidence in strict voter ID  
19 states like Virginia would become later.

20 Moreover, again, while 2% might seem like a small  
21 number, when you're talking about nearly five and a half  
22 million registered voters in Virginia in 2012, that's  
23 109,000 registered voters who, if you use the nationwide  
24 projections, wouldn't be confident they had the necessary  
25 IDs.

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1 And I'm not going into the details. The Pew study  
2 also showed considerable confusion among voters about the  
3 identification requirements in their states. Not  
4 surprising. Voters are not, you know, up on these fine  
5 details on election administration.

6 Q Does Dr. Owen's report address other issues?

7 A Yes. She also addressed my findings of the  
8 correlation since 2008 of the enactment of photo ID laws,  
9 and the partisan control in the States showing that except  
10 for, I think it was, one state, Rhode Island, it was  
11 Republicans who pushed voter photo ID through those  
12 states.

13 And she says first, quote, *"Support for Professor*  
14 *Lichtman's logic requires that states in which Republicans*  
15 *passed photo ID laws, have black populations roughly equal*  
16 *to or greater than that of Virginia."*

17 Q Is that claim accurate?

18 A Not of all.

19 Q Why not?

20 A First of all, I never made the claim. And second of  
21 all, it doesn't make a lot of sense for two reasons.  
22 Virginia is very high. I'm talking 19%. You can  
23 certainly get political benefits, given the enormous  
24 voting gap between blacks and whites. That black  
25 percentage is less than 19%. In fact, you get political

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1 benefits at every level of African-American population.

2       Moreover, in not every state are African-Americans  
3 the primary minority. And so looking only at  
4 African-Americans, like in Texas where the predominate  
5 minority is Hispanics, is not necessarily accurate either.  
6 So those are my three problems with it.

7 Q       And what other claims did Dr. Owen make?

8 A       She also says that most of the states adopting photo  
9 ID laws lack motivation to suppress minority votes because  
10 their presidential elections were not competitive.

11 Q       And what is your response to that claim?

12 A       I have two responses. Certainly having a competitive  
13 presidential election might be one factor, but it's hard  
14 to tell when a presidential election is going to be  
15 competitive. For example, Indiana adopted its voter photo  
16 ID law after the 2004 election where Bush won by a near  
17 landslide, but four years later Barack Obama won in  
18 Indiana.

19       In Pennsylvania in 2008, before they passed their  
20 law, Obama won by 14 points. But Pennsylvania is  
21 typically a swing state. And Republicans believed their  
22 prospects in 2012 were sufficiently bright for State House  
23 Republican leader, Mike Turzai, to say in June of 2012  
24 that the State's new photo ID law, quote, "*Is going to*  
25 *allow Governor Romney to win the State of Pennsylvania.*"

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1 And of course I'm not going to go into this. I detail  
2 lots of examples. Advantages accrue to lots of elections  
3 other than presidential elections, including statewide,  
4 State House, and congressional elections.

5 Q Let me ask you to -- does Dr. Owen address the issue  
6 of increasing voter confidence as a justification for a  
7 strict voter photo ID law in Virginia?

8 A She does. She says, you know, that there are  
9 indications that the adoption of photo voter ID laws  
10 increases confidence in elections; however, it's not  
11 sourced. I couldn't find any source for that statement in  
12 her report. And as we have seen evidenced from the  
13 surveys of voters directly contradict that showing either  
14 that there is no relationship, or for the reasons I  
15 explained, the relationship goes the other way it turns  
16 out.

17 Q And I believe you've already spoken about the survey  
18 of Performance of American Election Survey, is that right?

19 A I have.

20 Q Okay. And does Dr. Owen cite studies of voter photo  
21 ID and voter turnout?

22 A She does. She does attempt to demonstrate that the  
23 affects of voter ID do not reduce voter turnout, but there  
24 are serious problems with the study she cites.

25 Q And just briefly, what are those?

1 A Mostly, she relies on obsolete studies that do not  
2 reflect the current reality. She cites five studies that  
3 go back 2006, or farther. She cites only one out of all  
4 her studies, a post-2006 study, a study in Georgia, which  
5 does show in fact reduction in turnout. And she doesn't  
6 get the number right. She says it shows that turnout was  
7 depressed in Georgia by 16,642. But in fact, the authors  
8 say the different was 24,692.

9 She also inaccurately quotes the authors as saying  
10 that in Georgia, more African-Americans than whites had  
11 the most common forms of voter ID. The authors never say  
12 that. And the data from the survey of the Performance of  
13 American Elections shows quite the contrary. It's on Page  
14 26 of my report that African-Americans are 10 percentage  
15 points less likely to possess driver's licenses in  
16 Georgia, and 14 percentage points less likely to possess  
17 U.S. passports in Georgia.

18 Q And are there recent relevant studies that you  
19 haven't already discussed concerning this issue of the  
20 affect on turnout of voter ID laws?

21 A There's a very well-known, and very highly publicized  
22 study, that came out in 2014 by the General Accountability  
23 Office of the United States Government. A very respected  
24 nonpartisan arm of the government. And it looked at two  
25 strict photo ID states - Kansas and Tennessee. And unlike

1 many studies, did comparison with other states.

2 And to cut to the chase, the study found that both  
3 voter turnout was suppressed by the strict voter photo ID  
4 laws in these two states, and was suppressed  
5 disproportionately for African-Americans in both states.

6 Q And did Dr. Owen indicate any awareness of the study  
7 in her deposition?

8 A Yes. I looked at her deposition, and she said she  
9 was not aware of this study, which was very highly  
10 publicized, even in the general public.

11 Q And does Dr. Owen also point to aggregate voter  
12 turnout as an indicator of the affects of SB1256?

13 A She does.

14 Q And what's your response to that?

15 A I have a couple of responses. One, there are lots of  
16 influences on aggregate voter turnout. So aggregate voter  
17 turnout by itself will not isolate the affects of photo  
18 voter ID law. And I cited lots of evidence that actually  
19 did isolate its affect from the survey of Performance of  
20 American Elections.

21 Moreover, looking at the two midterm elections from  
22 2010 to 2014, aggregate turnout did drop in Virginia by  
23 2.4 percentage points. Not an insignificant amount  
24 despite the fact that there was no top of the ticket  
25 election in 2010. And we know, of course, in 2014,

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1 Virginia, had the most competitive Senate election in the  
2 country.

3 Q Did Dr. Owen compare SB1256 with voter ID laws in  
4 other states?

5 A She did. She looked at -- she had a table on Page 19  
6 of her report looking at Virginia's law as compared to  
7 five other states - Georgia, Indiana, Texas, South  
8 Carolina and North Carolina - and said Virginia has more  
9 acceptable IDs than other states with similar strict voter  
10 requirements.

11 Q And what's your response to that?

12 A Well, first of all, the statement is not correct. As  
13 I think I've already mentioned, I'm not sure I have,  
14 neither North Carolina nor South Carolina have strict  
15 voter photo ID laws. They both have reasonable impediment  
16 requirements. So that's two of the five.

17 In Texas, we know that both the District Court, and I  
18 was an expert witness in that case, and the Fifth Circuit  
19 Court of Appeals found that their law violated Section  
20 5 -- excuse me, violated Section 2 of the Voting Rights  
21 Act.

22 With respect the final two comparisons, Indiana and  
23 Georgia, there are also problems. The table indicates  
24 that in Virginia, unlike these states, a person could use  
25 a concealed carry. But Virginia's concealed carry does

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1 not include a photograph. And the table also indicates  
2 that Indiana does authorize expired IDs. In fact, it does  
3 over a 2-year, not a 1-year, period. And Georgia, of  
4 course, authorizes expired IDs.

5 THE COURT: Next question.

6 Q Does Dr. Owen's analysis, or table, address the issue  
7 of voter confusion?

8 A It does not. And of course we know that's a very --

9 THE COURT: Next question.

10 Q Does Dr. Owen address your table showing racial  
11 disparities in the possession of the most common forms of  
12 photo ID?

13 A She does.

14 Q And what else -- and what does she address on these  
15 disparities?

16 A She addresses it in two ways. First of all, she says  
17 the sample size is too small. In fact, there's no such  
18 thing as a too small sample size when you measure  
19 statistical significance. Statistical significance, as I  
20 explicitly stated in my report, is a function both of the  
21 size of the sample and the magnitude of the difference.  
22 And here, despite small samples for African-Americans, the  
23 magnitude of the difference was great enough to have  
24 statistical significance.

25 The second thing she does is do what's called an

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1 "overlapping confidence interval analysis." Even though  
2 the direct statistical tests show statistical  
3 significance, she says there isn't statistical  
4 significance because when you compute a 95% confidence  
5 band around the black estimate and the white estimate, the  
6 two confidence bands touch. However, you cannot use  
7 overlapping confidence bands as a test of statistical  
8 significance because you're using two separate  
9 probabilities. And the probability can be very low that  
10 there is -- that they're not statistically significant,  
11 even when they overlap.

12 I cite three very powerful statistical authorities on  
13 this. The Statistical Consulting Group at Cornell  
14 University, and --

15 MR. HEARNE: Your Honor, I note that the witness is  
16 basically reading his report into the record. The report  
17 has been admitted.

18 THE COURT: I think -- I don't want to be impolite,  
19 but we're going a little bit far afield here, okay? How  
20 much longer do you think you're going to be this evening,  
21 my friend?

22 MR. SPIVA: Well, I think he is addressing directly  
23 the rebuttal report of Dr. Owen, and I -- you know, I  
24 think probably another 20 minutes, Your Honor.

25 THE COURT: Then we'll recess until tomorrow morning.

1 MR. SPIVA: Okay. Thank you.

2 REPORTER'S CERTIFICATE

3 I, Krista Liscio Harding OCR, RMR, Notary  
4 Public in and for the Commonwealth of Virginia at  
large, and whose commission expires March 31, 2016,  
5 Notary Registration Number 149462, do hereby certify  
6 that the pages contained herein accurately reflect  
the notes taken by me, to the best of my ability, in  
the above-styled action.

Given under my hand this 10th day of March, 2016.

7 \_\_\_\_\_  
8 Krista L. Harding, RMR  
Official Court Reporter

9 THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT

10 GILBERT FRANK HALASZ, RMR

11 OFFICIAL COURT REPORTER  
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